Volume 5, No. 10, Pages 2891 to 3133, May 7 - May 18, 1990.

FCC Record

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Citation Form: **5 FCC Rcd 1 (1990)**

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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

SUN COMMUNICATIONS, INC. File No. 10232-CL-P-581-A-88

For construction authority to establish a new cellular system to operate on frequency block A in the Domestic Public Cellular Radio Telecommunications Service to serve the North Dakota 2--Bottineau Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: April 27, 1990; Released: May 7, 1990

By the Chief, Common Carrier Bureau:

I. BACKGROUND AND CONTENTIONS

1. Sun Communications, Inc. (Sun) won the non-wireline lottery for the North Dakota 2--Bottineau Rural Service Area (RSA). The Mobile Services Division (MSD) dismissed Sun's application as unacceptable for filing because Sun failed to submit a full-size 1:250,000 scale map as required by Section 22.903(a) of the Commission's Rules. In *Sun Communications, Inc.*, 4 FCC Rcd 6429 (Com. Car. Bur. 1989) (*Bureau Order*), the Common Carrier Bureau determined that since Sun's 1:500,000 scale map submitted after the lottery with its paper original application was legible, with clear latitude, longitude, and scale markings depicted on its face, the improper map scale did not render the application unacceptable for filing under Section 22.20 of the Rules.

2. After this decision was reached, the Bureau would have ordinarily reinstated Sun's application and allowed it to file a minor amendment to its application, submitting a full size map with a scale of 1:250,000. Nevertheless, the *Bureau Order* dismissed Sun's application because Sun had not signed the certification statement printed on the transmittal sheet filed with its initial (microfiche) application. Thus, Sun's application was dismissed for failure to comply with the Commission's "letter perfect" standard.

3. Sun has filed a petition for further reconsideration or for waiver of the Commission's Rules in which it requests that the Bureau either reinstate its application or waive the certification requirement. Sun notes that the transmittal sheet has all the identifying data necessary to log in and process Sun's application except for a signature on the certification statement. Further, Sun observes, its application was properly signed and certified on FCC Form 401, page 2, Schedule A, by Sun's President, and the missing signature was not discovered until after the lottery in the relevant market had been held. In this regard, Sun contends, the "letter perfect" standard was developed to help expedite the provision of cellular services to the public by expediting the processing of cellular applications. The certification as to the completeness of cellular applications was originally required to be the first page of each application so that intake processors did not have to hunt through the application to satisfy themselves, at least preliminarily, of its completeness. *Cellular Lottery Rules (Order On Further Reconsideration)*, 59 Rad.Reg.2d (P&F) 407, 410 (1985).

4. Sun stresses that, for RSA applications, the certification of completeness was removed from the first page of the application and placed on the transmittal sheet, which must be filed with the microfiche copies of an application. *See* Section 22.923(b)(7) of the Rules. Sun claims that this change further established the transmittal sheet's limited role as an initial processing tool to save staff time, not as a post-lottery tool for reviewing an application. Sun argues that to reason otherwise would render meaningless the required signature on FCC Form 401, Schedule A, page 2, and all the sworn answers which precede it. The foregoing signature is part of a certification that the statements made in the application are "true, complete and correct to the best of his (her) knowledge and belief, and are made in good faith." Sun contends that since its transmittal sheet provided the data necessary for preliminary processing and its application was included in the lottery, the transmittal sheet has served its purpose and cannot be the basis for post-lottery dismissal of its application. In sum, Sun argues that because the certification block for RSA applications is now contained in the transmittal sheet, and not in the application, it is no longer subject to additional review by the Commission after the initial intake stage.

5. Moreover, Sun argues that the circumstances in this case warrant a waiver of the certification requirement and reinstatement of Sun's application. Sun notes that the Commission may grant a waiver under Section 22.19 of the Commission's Rules when the underlying purpose of the rule would not be served or would be frustrated by applying the rule in a particular case or when the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Sun argues that the principal purpose of the certification requirement was to help expedite the processing of RSA applications. Sun contends that since the lack of a signature on the transmittal sheet did not interfere with the prompt processing of Sun's application, the goal of the certification requirement has been fulfilled. Further, Sun observes, if the Commission were not to grant a waiver of the rule, another lottery would have to be conducted and another application would have to be received and examined, all of which would frustrate the purpose of the rule, namely, expeditious processing of RSA applications and expeditious provision of cellular service to the public. Lastly, Sun contends that there are other unique facts in this case which justify waiver of the signature requirement. Sun notes that the Commission determined that Sun is qualified to be a Commission licensee when it granted Sun's application for authority to construct and operate the non-wireline cellular system for the New Mexico 5--Grant RSA. Sun claims that since both RSA applications contain the same legal and character disclosures, the Commission has already determined that Sun is legally qualified to be a Commission licensee, and has determined that Sun is not a speculative applicant.

II. DISCUSSION

6. The "letter perfect" standard requires each applicant for a cellular authorization to: sign a statement certifying to the completeness of its application, state the applicant's name, the market name, market number and frequency block for which it is applying; and to provide two properly identified microfiche copies of its executed application at the time of filing. *Johnstown Cellular Communications Co.*, 1 FCC Rcd 1164 (Com. Car. Bur. 1986); *Jacksonville Cellular Telephone Company*, 3 FCC Rcd 5386 (1988); *Satellite Cellular Systems*, 4 FCC Rcd 4477 (Com. Car. Bur. 1989), *app. for review denied*, FCC 90-96 (released March 20, 1990). Applications which fail to meet the "letter perfect" standard are dismissed. *See, e.g., PacTel Mobile Access*, 1 FCC Rcd 564 (1986).

7. After having reviewed the arguments set forth in Sun's petition, we find that it has failed to present any convincing reasons for the reinstatement of its application or for waiver of the requirement that the certification on the transmittal sheet be signed. Sun has clearly failed to comply with one of the "letter perfect" requirements in that it did not certify as to the completeness of its application by signing the certification statement on its transmittal sheet. Persons filing applications for initial cellular systems in the RSAs are required to file the transmittal sheet with two microfiche copies of the application. The transmittal sheet, which includes the certification of completeness, is an essential part of each RSA applicant's initial filing. By signing the certification statement on the transmittal sheet, an RSA applicant certifies, under penalties of perjury, that the application "is complete in every respect and contains all of the information required by FCC Form 401 and the Commission's cellular application rules." 47 C.F.R. Section 22.923(b)(7). This special certification is used as a replacement for the time-consuming pre-screening of applications which was previously conducted by the Commission's staff at the initial intake stage. This certification is required to be made pursuant to Section 22.923(b)(7) of the Rules, 47 C.F.R. Section 22.923(b)(7).

8. The fact that Sun's application was not dismissed prior to the lottery did not prohibit the Bureau from dismissing that application at a later date when the applicant's fatal error was discovered. As the *Bureau Order* held, failure to comply with any of the "letter perfect" requirements results in the dismissal of the application, no matter when the defect is discovered. *See, Satellite Cellular Systems*, FCC 90-96 (released March 20, 1990). *See also, Central Illinois Cellular Limited Partnership*, 2 FCC Rcd 436, 437 (Com. Car. Bur. 1987). Section 22.26(b) of our Rules, 47 C.F.R. Section 22.26(b), explains that acceptance of an application for filing merely means that it has been the subject of a preliminary review as to completeness and does not preclude the subsequent return or dismissal of the application if it is found to be defective. Moreover, there is a sound policy basis for applying the letter perfect requirement post-lottery. Because Sun's transmittal sheet did not contain the appropriate certification required by the "letter perfect" rule, Sun provided no assurance that its application had been reviewed by it for completeness. Without such assurances on the transmittal sheet, the Commission's staff would have to engage in the time-consuming process of reviewing all RSA microfiched applications to determine whether those applications are acceptable for filing pursuant to Section 309(i) of the Communications Act.[1] *See Cellular Lottery Rules (Order on Further Reconsideration)*, 59 Rad. Reg. 2d (P&F) 407, 409-10 (1985). Thus, the Bureau properly held that Sun's application was unacceptable for filing and should never have been included in the lottery which it won. In this light, Commission precedent holds that Sun's application must be dismissed and another lottery must be conducted among applicants who have met the "letter perfect" standard.

9. Further, Sun has not presented sufficient grounds to waive the certification requirement of the "letter perfect" standard. First, the staff's finding that Sun was fully qualified to construct and operate the non-wireline system in the New Mexico 5--Grant RSA is not relevant to our review of Sun's North Dakota 2--Bottineau application. The fact that Sun met all of our cellular requirements for the New Mexico RSA does not mean that its application for the North Dakota 2--Bottineau RSA was complete or correct at the time it was filed. Second, Sun has not demonstrated that the underlying purpose of the certification requirement will not be served by its application in this case, or that the facts of this case justify waiver.[2] As noted in paragraph 7 *supra*, the certification requirement was adopted to replace the previous pre-screening procedures by which the processing staff determined whether applications were minimally acceptable for inclusion in relevant lotteries pursuant to the directives of Section 309(i) of the Communications Act. This certification requirement ensures that processing is not delayed through lengthy pre-screening of numerous applications and is directly related to the Commission's goal of speeding service to the public. Sun has presented no unique facts to distinguish itself from any other applicant who fails to submit a signed certification, or which would otherwise render inequitable the application of the letter perfect standard in this case. Grant of a waiver herein would necessitate a similar waiver to any applicant who does not submit a signed certification, and would greatly increase staff processing time. Therefore, we conclude that Sun has failed to demonstrate that the purpose behind the certification requirement, expeditious service to the public, would be frustrated by its application in this case.

10. Accordingly, IT IS ORDERED that the petition for further reconsideration or for waiver of the Commission's Rules filed by Sun Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The initial processing staff reviewed only the transmittal sheet and the microfiche envelope to determine whether the application contained sufficient information for processing. The certification was moved from the application to the transmittal sheet precisely because it would be burdensome for the staff performing the initial screening function to look at the microfiche copies of every application to determine acceptability for filing. Sun's argument that the certification which appears at the end of Schedule A, page 2, Form 401 should suffice in this case is unavailing. That certification is a general statement that statements made in the application are "true, complete and

correct to the best of his (her) knowledge and belief, and are made in good faith." The basic purpose of that certification is to verify the truthfulness of statements in the application. In contrast, the certification as to completeness contained on the transmittal sheet has the purpose of verifying that the applicant in question has reviewed the application and that it is complete in every respect, that the applicant intends to build its proposed system and that it is the real party in interest behind its application.

[2] *See* Section 22.19 of the Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-243

In re Application of

WEINER BROADCASTING COMPANY — File No. BPIB-840904MZ

For a Construction Permit for a New International Broadcast Station at Monticello, Maine

HEARING DESIGNATION ORDER

Adopted: April 20, 1990; Released: May 7, 1990

By the Chief, Mass Media Bureau:

1. The Commission has before it for consideration the above-captioned application, as amended, of Weiner Broadcasting Company ("WBC") for a construction permit for a new international broadcast station at Monticello, Maine.

2. *Unresolved Issues.* Allan H. Weiner ("Weiner") is the President of WBC, former licensee of Station WOZW(AM), Monticello, Maine;[1] Station WOZI(FM), Presque Isle, Maine; and Remote Pickup Base Station KPF-941, Yonkers, New York. By *Order to Show Cause and Notice of Apparent Liability* (*MM Docket No. 85 - 109*), 50 Fed. Reg. 20603, published May 17, 1985, the Commission ordered Weiner and WBC to show cause why the licenses for these stations should not be revoked. The revocation hearing, however, never commenced. By *Memorandum Opinion and Order*, MM 4010 (released April 24, 1986), the Acting Chief, Mass Media Bureau, granted WBC's applications for the assignment of licenses of the AM and FM stations pursuant to the Commission's Minority Distress Sale Policy;[2] ordered WBC to surrender the authorization for its auxiliary station; and terminated the revocation proceeding. The Commission's termination of the revocation proceeding prior to hearing left unresolved several issues regarding Weiner's and WBC's basic qualifications to be or remain a Commission licensee. Accordingly, the unresolved issues specified in MM Docket No. 85-109 will be specified below. [3] The bases for having specified such issues against WBC and Weiner in the *Order to Show Cause and Notice of Apparent Liability* are incorporated herein by reference, and copies of the *Order to Show Cause and Notice of Apparent Liability* and the Mass Media Bureau's Bill of Particulars that was served on the licensee in MM Docket No. 85-109 are attached hereto.

3. *Radio New York International.* Information before the Commission indicates that from on or about July 23, 1987, to July 25, 1987, for approximately six hours per day, Weiner, and other individuals, acting under the name of Radio New York International, engaged in operating broadcast stations on 103.1 MHz (FM radio), 1620 kHz (AM radio), 6240 kHz (shortwave radio), without licenses, from aboard the vessel SARAH (then of Honduran registry) located in international waters off the coast of Long Island, New York. Such transmissions from the SARAH were received in the United States and caused objectionable interference to at least one FM station licensed to operate in the United States. On July 25, 1987, the Commission delivered a warning in writing to Weiner on board the SARAH, informing Radio New York International that the broadcasts were violating federal law. Radio New York International ignored the warning and continued to broadcast until on or about July 28, 1987, when Commission personnel and officers of the United States Coast Guard boarded the SARAH and arrested Weiner, among others.

4. The United States is a member of the International Telecommunication Union ("ITU") of the United Nations and is a signatory to the International Telecommunication Convention ("Convention"), the basic instrument of the ITU and the implementing authority for the current administrative Radio Regulations of the ITU. The Convention was done at Nairobi, Kenya, on November 6, 1982, and entered into force on January 1, 1984, definitively for the United States on January 10, 1986. The Convention is supplemented by administrative regulations which, pursuant to Article 42 of the Convention, are binding on members. These regulations, known as the Radio Regulations, have been incorporated by reference into § 2.100 of the Commission's Rules. Article 30, § 1(1) (¶ 2665) of the Radio Regulations of the ITU provides that "[t]he establishment and use of broadcasting stations (sound broadcasting and television broadcasting stations) on board ships . . . outside national territories is prohibited." Accordingly, an issue will be specified to determine whether Weiner violated Article 30, § 1(1) (¶ 2665) of the Radio Regulations by broadcasting from on board a ship outside national territories.

5. Based on the foregoing, the Commission is unable to determine whether grant of the above-captioned application would serve the public interest, convenience, and necessity.

6. Accordingly, IT IS ORDERED, That, pursuant to § 309(e) of the Communications Act of 1934, as amended, the above-captioned application is DESIGNATED FOR HEARING, at a time and place to be specified in a subsequent Order, upon the following issues:

a. To determine whether Weiner operated a radio station on 1616 kHz in Monticello, Maine, at various times from January 31, 1982, through July 16, 1984, without Commission authorization, in violation of § 301 of the Communications Act of 1934, as amended;

b. To determine whether Weiner and/or WBC refused to allow an inspection of Station WOZW(AM), Monticello, Maine, on May 3, 1984, by an authorized Commission representative, in violation of § 73.1225 of the Commission's Rules;

c. To determine whether Weiner and/or WBC failed to comply with the then-prevailing main studio location requirements of § 73.1125 of the Commission's Rules;

d. To determine whether Weiner and/or WBC operated Remote Pickup Base Station KPF-941, Yonkers, New York, to broadcast directly to the public on 1622 kHz, in violation of the permitted uses for remote pickup base stations as stated in the then-prevailing provisions of §§ 74.431(e), 74.431(g), 74.432(c)(2), 74.432(c)(5), and 74.432(g) of the Commission's Rules;

e. To determine whether Weiner and/or WBC misrepresented to the Commission that the transmitter to be used for Remote Pickup Base Station KPF-941, Yonkers, New York, would comply with the then-prevailing type acceptance criteria of § 74.451(a) of the Commission's Rules;

f. To determine whether Weiner, from on or about July 23, 1987, to on or about July 28, 1987, aboard a vessel in international waters and without a license, engaged in operating broadcast stations the transmissions of which were received in the United States, in violation of Article 30, § 1(1), ¶ 2665, of the Radio Regulations of the International Telecommunication Union of the United Nations.

g. To determine, based on the evidence adduced pursuant to the foregoing issues, whether Weiner and/or WBC possess(es) the requisite character qualifications to be a Commission licensee;

h. To determine, based on the evidence adduced pursuant to the foregoing issues, whether the application should be granted.

7. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence with regard to Issues (a) - (f), *supra*, SHALL BE on the Mass Media Bureau; the burden of proceeding with the introduction of evidence with regard to Issue (g), *supra*, SHALL BE on Weiner Broadcasting Company; and the burden of proof with respect to Issues (a) - (h), *supra*, SHALL BE on Weiner Broadcasting Company.

8. IT IS FURTHER ORDERED, That copies of all amendments filed in this proceeding subsequent to the date of adoption of this Order SHALL BE SERVED on each of the following: Chief, Hearing Branch, Mass Media Bureau, 2025 M Street, N.W., Room 7212, Washington, D.C. 20554; Chief, Auxiliary Services Branch, Mass Media Bureau, 2025 M Street, N.W., Room 7310, Washington, D.C. 20554; and Chief, International Notifications Group, Mass Media Bureau, 2025 M Street, N.W., Room 8120, Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, Weiner Broadcasting Company, pursuant to § 1.221(c) of the Commission's Rules, in person or by its attorney, SHALL FILE WITHIN 20 DAYS OF THE MAILING OF THIS ORDER, in triplicate, a written NOTICE OF APPEARANCE stating its intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, gave notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] Effective August 10, 1987, the call sign was changed to WREM(AM).

[2] *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978), *held unconstitutional, Shurberg Broadcasting of Hartford, Inc.*, 876 F.2d 902 (D.C. Cir. 1989), *cert. granted sub nom. Astroline Communications Co. Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, 110 S.Ct. 715 (1990).

[3] *Cf. Allegan County Broadcasters, Inc.*, 83 FCC 2d 371 (1980) (unresolved character allegations against a dismissing applicant can be revisited in a future proceeding in the event the applicant again seeks to obtain a Commission authorization).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LONG DISTANCE/USA, INC.

Petition for Waiver of Part 61
and Sections 63.01 and 63.10 of
the Commission's Rules

ORDER

Adopted: April 30, 1990; Released: May 7, 1990

By the Chief, Common Carrier Bureau:

1. On November 23, 1988, Long Distance/USA (LD/USA) filed a request for waiver of the tariff requirements applicable to resellers of international common carrier telecommunications services as specified in Part 61 and Sections 63.01 and 63.10 of the Commission's Rules, 47 C.F.R. Part 61, §§ 63.01, 63.10.[1] LD/USA seeks temporary relief of these requirements pending the outcome of a petition for Rule Making filed by the Competitive Telecommunications Association (CompTel).[2] No pleadings have been filed with regard to the LD/USA request for waiver.

2. LD/USA claims that it and other resellers are unfairly burdened by the Commission's current tariff requirements. LD/USA explains that most international resellers have no reason other than the Commission's requirements for maintaining the internal resources, staff, and expertise required to undertake the tariff filing responsibility. Petition for Waiver at 2. LD/USA contends that it is both difficult and expensive for it and other resellers to keep pace with the tariff changes made by the underlying facilities-based carriers. [3] It claims that these constraints often prevent resellers from adjusting their rates in accordance with changes made by the underlying carriers, often to the detriment of the reseller. LD/USA argues the tariff filings are unnecessary because competitive market pressures ensure that resellers continue to set reasonable rates. It also asserts that since some resellers, and the underlying providers, will continue to maintain international tariffs on file with the Commission the public will still have access to the "going rate." *Id.* at 3.

3. We believe it would be inappropriate for us to grant LD/USA's petition for waiver. The petition does not state any grounds for waiver apart from LD/USA's belief that the rule is undesireable. That question will be addressed when the Commission acts on the Rule Making petition. Therefore, LD/USA's petition must be denied.

4. Accordingly, IT IS ORDERED that the petition for waiver of Part 61 and Sections 63.01 and 63.10 of the Commission's Rules, 47 C.F.R. Part 61, §§ 63.01, 63.10, filed by Long Distance/USA on behalf of LDB Corporation, Advantage Networks, Inc., American Telesystems, American Sharecom, Inc., IT&E Overseas, Inc., Business Telecom, Inc., and Mid-American Long Distance Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] LD/USA also seeks relief on behalf of LDB Corporation, Advantage Networks, Inc., American Telesystems, American Sharecom, Inc., IT&E Overseas, Inc., Business Telecom, Inc., and Mid-American Long Distance Company.

[2] Concurrently with LD/USA's petition for waiver, CompTel filed a petition for Rule Making, RM No. 6621, requesting that the Commission eliminate tariffing requirements for international resellers. LD/USA and the other resellers associated with the instant waiver request are members of CompTel.

[3] Resellers base their rates on the rates of the carrier whose facilities are used to carry the international traffic. As a general practice, these rates are then increased to cover the costs of the reseller. Resellers tariff their services either by referencing the appropriate tariff section of the underlying facilities-based carrier and identifying the mark-up, or by listing the actual rate in their own tariffs. The Commission does not require resellers who list rates to file tariff changes simultaneously with the facilities-based carrier. Resellers usually incorporate sufficient flexibility into their rates so that the relationship between the facilities-based carrier and the rate of the reseller can be maintained notwithstanding rate changes made by the facilities-based carrier.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE SOUTHWEST

Request to Allow Amortization of Debt Refinancing Expenses and Unamortized Discounts and Premiums Associated with Reacquired Debt — AAD 8-1902

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: April 30, 1990; Released: May 8, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On January 29, 1988, GTE Southwest Incorporated (GTE) requested permission, under Part 31 and Part 32 of the Commission's rules, to amortize debt refinancing expenses, call premiums, and the unamortized discounts and expenses associated with bond and preferred stock redemptions. For reasons discussed in the succeeding paragraphs, we deny GTE's request and require it to follow the accounting treatment prescribed in Part 32 of the rules. In addition, pursuant to our authority under Section 220(d) of the Act, 47 U.S.C. Section 220(d), and Section 0.291 of the Commission's rules, 47 C.F.R. §0.291, we find GTE apparently liable for a forfeiture to the United States of the sum of $9,000 for its failure to follow the Commission's rules when accounting for these redemptions.

2. When debt is issued, the cash actually received is often different than the face amount to be paid at maturity. When the cash received is higher than the face amount, the difference is called a premium, and when the amount of cash received is less than the face amount, the difference is called a discount. These premiums and discounts adjust the value of the debt security to reflect that the interest rate at time of issue is lower or higher than the interest rate stated on the debt security. Over the term of the debt, premiums or discounts are amortized so that at maturity, the recorded amount of debt will coincide with the face amount actually owed at maturity.

3. When debt is extinguished (paid off) before its maturity, the amount actually paid out, the reacquisition cost,[1] is often different than its net carrying amount.[2] When there is a difference between the net carrying amount and the reacquisition cost, a gain or loss results from the transaction. The prescribed accounting treatment, under both Part 31 and Part 32 of the Commission's rules, 47 C.F.R. Part 31 and 47 C.F.R. Part 32, [3] requires that gains or losses associated with reacquired debt be included in the determination of net income in the year the debt is paid off. When refinancing was involved (*i.e.*, paying off old debt with new borrowing), Part 31 permitted these gains or losses (usually losses) to be associated with the new debt and to be amortized to income or expense accounts over future periods if specific approval of the Commission had been obtained. Part 32 does not include language that would permit similar amortization outside of the waiver process because, in adopting Part 32, the Commission decided that the accounting system should be consistent with generally accepted accounting principles (GAAP) (absent some overriding regulatory concern) and such amortizations are not allowed under GAAP.[4] GAAP requires that differences between the reacquisition price and the net carrying amount of the old debt be included in determinations of net income in the year the old debt is paid off, whether refinancing is involved or not.

4. A company may also retire its preferred stock. Under GAAP, all amounts related to preferred stock retirements are reflected in the balance sheet and do not affect net income.

5. In September 1987, GTE began a series of refinancing transactions. On September 1, 1987, it retired $30 million of preferred stock using short-term borrowings. On October 29, 1987, GTE issued $80 million of 10-3/8% bonds due 2017. The proceeds from that issue were used to reduce the short-term debt incurred to retire the $30 million of preferred stock and to retire $50 million of 12-7/8% bonds due 2012. These transactions were concluded December 1, 1987 and GTE's request was filed on January 26, 1988.

II. GTE'S REQUEST

6. In accounting for the $50 million debt, GTE proposes to classify the call premium associated with the redemption and the remaining unamortized discount and expenses to Account 1407, Unamortized debt issuance expense.[5] The discount on the new issue would be classified to Account 4230, Discount on long-term debt.[6] GTE also proposes to reflect the tax timing differences associated with the refinancing by charges to Accounts 4340, Net noncurrent deferred operating income taxes, and 7220, Operating federal income taxes, and credits to Accounts 4070, Income taxes-accrued and 7250, Provision for deferred operating income taxes-net. GTE seeks permission to amortize over the life of the new issue, to Account 7530, Amortization of debt issuance expense, the amounts related to the refinancing recorded in Accounts 1407 and 4230.

7. GTE states that refinancing the $50 million debt will be beneficial to ratepayers because it claims that refinancing will reduce the fixed charges ultimately paid by ratepayers by $1,054,594 annually. GTE believes it is in the best interest of its company and its ratepayers for the Commission to allow the amortization of call premiums and unamortized discounts and related expenses in the reacquisition of debt.

8. GTE proposes to classify the call premium associated with the repurchase of the $30 million preferred stock to Account 4520, Additional paid-in capital.[7] GTE proposes to amortize the premium on the repurchase of preferred stock by debiting Account 4550, Retained Earnings and crediting Account 4520. To record the discount and related estimated expenses associated with the issuance of the new bonds, GTE plans to debit Accounts 1407 and 4230 and credit Account 1130, Cash. GTE would amortize the discount and expenses over the life of the new

issue by monthly charges to Account 7530. GTE also explains that refunding preferred stock is similar to that of refunding high coupon debt. It states that the replacement of high dividend preferred stock with lower cost debt will reduce the overall cost of capital for ratepayers with annual savings to ratepayers of $517,222.[8]

9. At the time GTE filed its request, we had under consideration a similar waiver request from BellSouth. On January 5, 1989, we issued the *BellSouth Order*,[9] denying BellSouth permission to amortize debt refinancing expenses, unamortized discounts and premiums associated with the reacquired debt either over the life of the replacement issue or over the remaining life of the called debt issue. In the *BellSouth Order*, we concluded that Part 32 accounting, which reflected GAAP, was appropriate.[10]

10. After release of the *BellSouth Order*, GTE, by letter filed March 6, 1989, renewed its request for permission to amortize premiums associated with the redemption of the higher cost bonds and the unamortized discount and expenses associated with that issue of bonds under the provisions of Part 31. GTE contends that the *BellSouth Order* should not control GTE's request because that decision was properly considered under Part 32 of the rules. GTE claims that despite the fact its request was submitted after Part 32 became effective, its request is controlled by Part 31, which was in effect at the time of the transactions. GTE also claims that it undertook the calls and refinancing in reliance on the assumption that Part 31 procedures and precedents controlled.

III. COMMENTS

11. Interested parties were invited to file comments on GTE's request on or before March 21, 1988, and reply comments on or before March 31, 1988. Comments were received from BellSouth Corporation, South Central Bell Telephone Company and Southern Bell Telephone Company (BellSouth). No reply comments were filed.

12. BellSouth fully supports GTE's request for permission to amortize expenses, unamortized discounts and premiums. It states that the Commission has historically allowed such treatment if the carrier could demonstrate that such refinancing lowers the cost of debt to the ratepayers. It further states that the Commission viewed such action as sound and prudent on behalf of the management of the corporation. BellSouth argues that carriers' stockholders should not be required to absorb costs associated with refinancing if the net effect of the refinancing is to lower overall costs to the ratepayers. BellSouth contends that if the carrier can show that the ratepayers will benefit from refinancing, the Commission should allow amortization either over the life of the new issue or over the life of the called issue.

IV. DISCUSSION

A. GTE's Request for Amortization

13. In this case, GTE would amortize approximately $5.68 million in call premiums and unamortized discounts associated with the retired debt over the life of the replacement debt. This, in effect, reduces the overall savings in future years from lower interest costs associated with the replacement debt issue. Beyond the year of extinguishment, the savings is lower than it would otherwise be. In the *Amortization Order* [11] the Commission concluded that it would adhere to the GAAP requirements. Later, in the *BellSouth Order*,[12] the Commission concluded definitively that amortization would be inappropriate because it burdens future accounting periods with costs that are properly associated with debt contracts no longer in existence. Moreover, the Commission concluded that decisions of whether to refinance existing debt are subject to a variety of considerations and not preconditioned upon the ability to defer and amortize costs associated with debt. Consistent with the *Amortization Order* and the *BellSouth Order*, we deny the GTE request as it relates to the debt refinancing.

14. We also deny GTE's request as it pertains to the preferred stock reacquisition. GTE's deferral accounting for the preferred stock transaction is inconsistent with Part 31 and Part 32. While GTE's request emphasizes the similarities between preferred stock and long term debt, preferred stock is still capital stock and the accounting prescribed in Part 31 for reacquisitions of capital stock required the necessary adjustments for the difference between (1) the book amount of the capital stock that has been reacquired and (2) the amount actually paid for it plus the amount of expense incurred with the reacquisition to be recorded in a paid-in capital account to the extent of any balance already recorded. Any excess of a debit adjustment is to be charged to retained earnings (47 CFR §31.1-13 (d)). Similar accounting is required under Part 32 in Section 32.4520. The accounting suggested by GTE would result in an understatement of additional paid-in-capital (an account used to record shareholder purchase price over and above the par or stated value of the stock) and an overstatement of retained earnings (an account used to record undistributed earnings). Because of these distortions and the undesirability of establishing a new precedent we would not be inclined to grant GTE's request for this accounting even if it were styled as a formal waiver request.

B. GTE's Apparent Unauthorized Deferral and Amortization

15. Our review of GTE's Annual Report Form M for the year ended December 31, 1987, indicates that GTE deferred the amounts for which it requests amortization and has begun to amortize the costs associated with this refinancing transaction.

16. The fact that the reacquisition transactions took place in 1987 does not guide the answer to the question of whether or not GTE should have deferred the debt refinancing expenses and unamortized discounts and premiums associated with the transactions. GTE needed specific permission to defer and amortize these costs. GTE did not have such permission in 1987 nor did it request permission until January 29 of the following year. This resulted in these costs being deferred in balance sheet accounts instead of being included in the determination of net income for 1987, as Part 31 required absent specific permission for deferral and amortization.

17. We disagree with GTE's contention that there is clearly established precedent for the kind of after the fact approval it seeks in its request.[13] There is no approval precedent for allowing a carrier to institute deferral and amortization and then request permission to do so in the succeeding fiscal year. Not only is this procedure contrary to Section 220 of the Communications Act, but it also

amounts to a *de facto* presumption that the accounting would be approved since it allows no time for corrective action if the request is denied.

18. If GTE relied on the fact that approval would be granted routinely, there was ample evidence to indicate that Commission policy with respect to routinely allowing amortizations of gains or losses on debt reacquisitions had changed. As previously mentioned, Part 32, which was adopted on May 1, 1986, and was to go into effect on January 1, 1988, contained no provisions for requesting permission to defer and amortize gains or losses on refinancing transactions and the Commission declined to amend the rules in the *Amortization Order*. GTE itself commented in this proceeding.[14]

19. The evidence indicates GTE has undertaken the deferral and amortization without permission from the Commission based on the assumption that approval would be granted. Since GTE has not received the Commission's approval it was not in compliance with Sections 31.1-13(b) and 31.1-15(f) of Part 31 of the Commission's rules and is not in compliance with Sections 32.4240 and 32.4520 of the Commission's Part 32 rules. Accordingly, because GTE is in violation of the Commission's accounting rules and would have been in violation even if Part 32 had not been adopted, we propose to impose a forfeiture of $9,000 against it.

V. ORDERING CLAUSE

20. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that GTE's request for waiver of Section 32.4240 of the Commission's rules to permit amortization of debt refinancing expenses and unamortized discounts and premiums associated with reacquired debt and preferred stock over the life of new debt issue IS DENIED.

21. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that GTE shall make entries to its accounts charging any unamortized debt reacquisition costs related to the old debt recorded in Accounts 1407, Unamortized debt issuance expense, and 4230, Discount on long-term debt, to Account 7360, Other nonoperating income, and the unamortized reacquisition costs recorded in Account 4520, Additional paid-in capital, to Account 4550, Retained earnings, within thirty days of the release of this Order.

22. IT IS FURTHER ORDERED, pursuant to Section 220(d) of the Communications Act of 1934, as amended, 47 U.S.C. §220(d) and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, that GTE is APPARENTLY LIABLE FOR A FORFEITURE of $9,000 for its continued failure to follow the accounting treatment prescribed in Sections 32.4240 and 32.4520 of the Commission's rules.

23. IT IS FURTHER ORDERED, that GTE shall, within thirty days of the release date of this notice, PAY THE FULL AMOUNT OF THE FORFEITURE currently outstanding as of that date OR FILE A RESPONSE showing why the forfeiture should not be imposed or why the proposed forfeiture should be reduced.[15] If the forfeiture is not paid, the response should include supporting evidence to rebut in full the tentative conclusions described in this notice. *See* 47 C.F.R. §1.80(f)(3).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The reacquisition cost is the amount paid for the early extinguishment before maturity, including any call premium and expense of reacquisition.

[2] The net carrying amount of the debt includes the amount payable at maturity adjusted for any unamortized premium or discount related to the debt as well as any unamortized debt issue costs.

[3] Part 31 was effective through December 31, 1987. It was replaced by Part 32, effective January 1, 1988. *See* Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies, 51 F. R. 24745 (July 8, 1986); 51 F.R. 43493 (December 2, 1986); *recon.*, 2 FCC Rcd 1086 (1987); *further recon.*, 2 FCC Rcd 6555 (1987).

[4] The absence of language similar to that contained in Part 31 does not affect the ability of carriers to request waivers pursuant to 0.457 of the Commission's Rules.

[5] GTE states that the call premium for redeeming the $50 million debt is $5,095,000 and the unamortized balance in the discount account for the $50 million debt is $586,869.

[6] GTE states that the discount on its new issue is $914,400.

[7] The call premium for the $30 million preferred stock is $826,200.

[8] This $517,222 represents the difference between the annual dividend of $3,675,000 that would be paid on the preferred stock and $3,157,778 which represents the total of the yearly interest on the new bonds, the yearly amortization of discount and issuance costs of the new bonds and the amortization of premium on the repurchased preferred stock.

[9] BellSouth Petition for Waiver of Section 32.4240 of the Commission's Rules to Permit Amortization of Debt Refinancing Expenses, Unamortized Discounts and Premiums Associated with Reacquired Debt Either Over the Life of the Replacement Issue or Over the Remaining Life of the Called Debt Issue, *Memorandum Opinion and Order*, 4 FCC Rcd 387 (Common Carrier Bureau, 1989) (*BellSouth Order*), *petition for recon. pending.*

[10] The Commission had reached essentially the same conclusion in an earlier order denying a BellSouth petition for Rule Making. *See*, Use of Generally Accepted Accounting Principles in Part 32 of the Commission's Rules, 2 FCC Rcd 6675 (1987) (*Amortization Order*).

[11] *Id.*

[12] *See* note 9 *supra.*

[13] GTE's March 1, 1989, letter at pp. 2-3.

[14] *See* note 10 *supra.*

[15] Such a forfeiture amount should be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Forfeiture Unit, Financial Services Branch, Federal Communications Commission, Box 19209, Washington, D.C. 20036, or delivered to the Forfeiture Unit, Room 452, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

AAT RADIOTELEPHONE COMPANY — File No. 30125-CD-P-89

For authority to construct facilities in the Public Mobile Service on Frequency 454.075 MHz at Valhalla and Selden, NY, and at Alpine and West Patterson, NJ

PAGING ASSOCIATES, INC. — File No. 20001-CD-P-89

For Authority to construct facilities in the Public Mobile Service on Frequency 454.075 MHz at Stamford, CT

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 1990; Released: May 7, 1990

By the Chief, Mobile Services Division:

1. On July 14 and August, 2, 1989, AAT Radiotelephone Company ("AAT") filed four separate applications seeking authority to construct facilities in the Public Mobile Service ("PMS") on frequency 454.075 MHz at Valhalla and Selden, NY, and at Alpine and West Patterson, NJ. On August 2, 1989, Paging Associates, Inc. ("Paging") filed an application seeking authority to construct facilities in the PMS on frequency 454.075 MHz at Stamford, CT. AAT's applications are electrically mutually exclusive with Paging's application.

I. BACKGROUND

2. On March 6, 1990, the Commission announced that it would conduct a lottery to select between the applications of AAT and Paging. *See* Lottery Notice, Lottery PMS 35, Mimeo No. 2060 (released Mar. 6, 1990).[1] On April 5, 1990, AAT Radiotelephone Company ("AAT") filed a request that the Commission designate the captioned applications for comparative hearing.

3. The lottery was held on April 11, 1990, and Paging's application was ranked first. *See* Public Notice, PMS Lottery-35, Mimeo No. 2695 (released Apr. 13, 1990). On April 13, 1990, Paging filed an opposition to AAT's hearing request.

II. DISCUSSION

4. AAT has failed to demonstrate that it was eligible for a comparative hearing. Selection by lottery among mutually exclusive applicants is the general rule, and exceptions to the rule are strictly construed and enforced. *See Metro Mobile Corporation*, 5 FCC Rcd 1040 (Mob. Serv. Div. 1990); *Mobile Phone of Texas*, Mimeo No. 2728 (Mob. Serv. Div. released Feb. 22, 1985). Section 22.31(c)(1) requires that applicants requesting a comparative hearing satisfy certain requirements. AAT has satisfied one of these requirements because its proposed transmitter sites are located within 40 miles of its existing transmitter locations and are for the same frequency.

5. Section 22.33(c)(1), however, further requires that a requesting applicant demonstrate a demand by existing subscribers for expanded service. We find that AAT's sole showing in this regard, namely, that, "the applications were filed for the purpose of meeting the demand of existing subscribers for expanded coverage within the Greater New York City metropolitan area" is not sufficient to justify a comparative hearing. We have previously denied hearing requests when an applicant did not submit specific information which is necessary to comply with Section 22.33(c)(1). *See Bay Springs Telephone Co.*, 3 FCC Rcd 2133 (Mob. Serv. Div. 1988) (mere assertion that all of subscribers contacted, signed written requests for proposed expanded service found unpersuasive); *Radio Call Company of Long Island, Inc.*, 2 FCC Rcd 6772 (Mob. Serv. Div. 1987) (mere representation that expanded service is needed in response to subscriber demand is insufficient); *Speed Call, Inc.*, 2 FCC Rcd 6530 (Mob. Serv. Div. 1976) (subscriber survey forms submitted to indicate demand were found insufficient). AAT's showing, quoted above in its entirety, is far less than the purported showings we rejected in *Bay Springs*, *Radio Call, and Speed Call*. AAT thus has failed to show that the public interest would be served by using a comparative hearing procedure. Therefore, we deny AAT's request for comparative hearing.

III. ORDERING PARAGRAPH

6. Accordingly, IT IS ORDERED that the request for comparative hearing filed by AAT Radiotelephone Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] The Lottery Notice pointed out that AAT's four applications (File Nos. 30125-CD-P-89, 30192-CD-P-89, 30194-CD-P-89, and 30649-CD-P-89) were consolidated into one application, File No. 30125-CD-P-89, because they involve the same general geographic area.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BLACK TELEVISION
WORKSHOP OF
LOS ANGELES, INC.
(Assignor)

HISPANIC CHRISTIAN
COMMUNICATIONS
NETWORK
(Assignee)

For Assignment of Construction Permit for
Noncommercial Educational Station KEEF-TV,
Los Angeles, California

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1990; Released: May 7, 1990

By the Commission:

1. The Commission has before it for consideration: (a) a *Memorandum Opinion and Order*, 4 FCC Rcd 8091 (Chief, Mass Media Bureau, released November 14, 1989) (" *MO & O* "); (b) an Application for Review of the *MO & O*, filed December 11, 1989, by Black Television Workshop of Los Angeles, Inc. ("BTW"); (c) an Application for Review of the *MO & O*, filed December 1, 1989, by Hispanic Christian Communications Network ("HCCN"); (d) a Supplement to Application for Review, filed January 16, 1990, by HCCN; (e) a Further Supplement to Application for Review, filed February 14, 1990, by HCCN; (f) a Request for Extension to File an Opposition to Two Applications for Review, filed January 2, 1990, by Mary V. Woodfork ("Woodfork"); and (g) Comments on Woodfork's extension request, filed January 9, 1990, by HCCN.[1]

BACKGROUND

2. BTW is the Permittee of Noncommercial Educational Station KEEF-TV, Los Angeles, California. By *Order to Show Cause, Hearing Designation Order, and Notice of Apparent Liability (MM Docket No. 88 - 420)*, 3 FCC Rcd 5443 (1988), the Commission directed BTW to show cause why its construction permit for KEEF-TV should not be revoked. Thereafter, on March 22, 1989, BTW and HCCN filed an application seeking consent to the assignment of the KEEF-TV construction permit from BTW to HCCN pursuant to the Commission's *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978) (" *Minority Distress Sale Policy* "). BTW and HCCN also filed simultaneously therewith an Emergency Petition for Special Relief.

3. By letter dated April 14, 1989, the Acting Chief, Mass Media Bureau, dismissed the assignment application and denied the Emergency Petition for Special Relief because, *inter alia*, the *Minority Distress Sale Policy* had earlier been ruled unconstitutional. *See Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), *cert. granted sub nom. Astroline Communications Co. Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, 110 S.Ct. 715 (1990).

4. On May 15, 1989, BTW and HCCN filed a Petition for Reconsideration of the staff letter and resubmitted their assignment application therewith. By the referenced *MO & O*, the Chief, Mass Media Bureau, denied the Petition for Reconsideration and again dismissed the assignment application.[2] BTW and HCCN now seek review of that MO&O.

DISCUSSION

5. As shown above, BTW and HCCN seek authority to assign the construction permit for KEEF-TV from BTW to HCCN pursuant to the Commission's *Minority Distress Sale Policy*. However, the United States Court of Appeals for the District of Columbia Circuit has ruled that the *Minority Distress Sale Policy* is unconstitutional. Accordingly, this agency cannot grant the relief requested.

6. Given the foregoing, we need not pass on BTW's and HCCN's arguments involving alleged errors by the Bureau.[3] Even assuming, *arguendo*, that such arguments had merit,[4] we simply cannot now approve the minority distress sale contemplated by BTW and HCCN because we are barred by law from doing so. Thus, for all intents and purposes, the errors alleged to have been committed by the Bureau are not of decisional significance. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied* 403 U.S. 923 (1971).

7. ACCORDINGLY, IT IS ORDERED, That the Request for Extension to File an Opposition to Two Applications for Review, filed January 2, 1990, by Mary V. Woodfork, IS DISMISSED AS MOOT.

8. IT IS FURTHER ORDERED, That the Comments of Hispanic Christian Communications Network on Woodfork's request for an extension of time, filed January 9, 1990, IS DISMISSED AS MOOT.

9. IT IS FURTHER ORDERED, That the Application for Review, filed December 11, 1989, by Black Television Workshop of Los Angeles, Inc., IS DENIED.

10. IT IS FURTHER ORDERED, That the Application for Review, filed December 1, 1989, and the supplements thereto, filed January 16, 1990, and February 14, 1990, by Hispanic Christian Communications Network, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] As of this date, Woodfork has not filed an opposition to the above-referenced applications for review. Accordingly, her request for an extension of time, until January 22, 1990, within which to do so will be dismissed as moot. For this same reason, HCCN's comments on Woodfork's request also will be dismissed as moot.

[2] On June 29, 1989, BTW and HCCN filed a Petition for Extraordinary Relief seeking grant of the same assignment application on grounds other than the *Minority Distress Sale Policy*. The Petition for Extraordinary Relief is pending before the Commission in MM Docket No. 88-420 and will be considered at the appropriate time in a separate order.

[3] BTW alleges that the Bureau erred by:

> (a) holding that a purported ownership dispute was an absolute bar to the assignment and distress sale; (b) holding that it must determine in a hearing which person should have been elected to the Board of Directors of BTW; (c) holding that a designated unauthorized transfer of control issue must first be resolved before the assignment and distress sale are granted; (d) confusing a previously proposed distress sale with the one currently proposed; (e) holding that the petition for reconsideration did not comply with the Commission's procedural rules; (f) failing to consider a motion to strike Woodfork's opposition to the petition for reconsideration; (g) declining to recuse itself from consideration of the proposed assignment and distress sale; and (h) dismissing the assignment application as unacceptable for filing and not allowing public notice.

HCCN alleges that the Bureau erred by:

> (a) finding and concluding that there is a continued dispute among the directors of BTW that must be resolved before a distress sale or any assignment of the permit of KEEF-TV can be permitted; and (b) dismissing the assignment application.

[4] One such allegation warrants brief discussion. BTW alleges that the Bureau erred by declining to recuse itself from consideration of the proposed assignment and distress sale because of an inherent conflict of interest arising from the Bureau's status as a party in the revocation proceeding, MM Docket No. 88-420. *See*, n. 3, *supra*. Distress sale requests, however, are considered in the context of revocation proceedings, and the Commission has expressly delegated to the Bureau the responsibility for reviewing and ruling upon distress sale requests. *See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849, 858 (1982). Thus, BTW's allegation is without merit.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-167

In re Applications of

JOHN SPENCER ROBINSON (hereafter "Robinson")	File No. BPH-880406MB
DEHARO RADIO, LTD. (hereafter "deHaro")	File No. BPH-880406MI
YOLANDA JUAREZ NAISMITH (hereafter "Naismith")	File No. BPH-880407MC
ALLARD FM, INC. (hereafter "Allard")	File No. BPH-880407MK
EDGEWATER COMMUNICATIONS, INC. (hereafter "ECI")	File No. BPH-880407MN
ROSALIE VAN ZANDT (hereafter "Van Zandt")	File No. BPH-880407MZ
RONALD & BENNIE JO HILL GENERAL PARTNERS IN HILL AND HILL LTD. (hereafter "Hill")	File No. BPH-880407NB

For Construction Permit
for a New FM Station on Channel 226A (93.1 MHz)
in Edgewater, Florida

HEARING DESIGNATION ORDER

Adopted: March 13, 1990; Released: May 9, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *deHaro*. On April 12, 1989, deHaro filed an amendment pursuant to 47 C.F.R. § 1.65 indicating that the Federal Aviation Administration (FAA), by letter dated July 25, 1988, notified the applicant that its originally proposed tower height would constitute a hazard to air navigation unless the tower height was reduced or the tower itself was relocated. DeHaro further notes that an alternate site was located in September, 1988, and a written assurance of the availability of the new site was received by the applicant in a letter dated November 8, 1988. The FAA, upon consideration of the amended site, noted in a March 29, 1989 correspondence that the applicant's new proposal exceeded the FAA "Part 77 obstruction standards" by 27 feet. In response to the FAA's notice, the applicant's engineering consultant requested a further FAA aeronautical study on its new proposal. Finally, deHaro states that it will amend its application to specify the new transmitter site upon FAA completion of the aeronautical study.

3. Since good cause has been demonstrated for the submission of the proposed amendment, deHaro will be allowed to amend its application. Accordingly, deHaro will be required to file its transmitter site relocation amendment, including the Section VII site availability certification, with the presiding Administrative Law Judge within 30 days of the release of this Order. In addition, an air hazard issue will be specified below.

4. *ECI*. ECI proposes to sidemount its antenna on the existing tower of Pelican Broadcasting, Inc., licensee of WCCZ(AM), New Smyrna Beach, Florida.[1] Although the location specified is identical to WCCZ's authorized facility, the coordinates are slightly different. WCCZ is licensed at 29^0 00' *48* " N. Latitude and 80^0 54' *50* " W. Longitude. ECI's proposed coordinates are 29^0 00' *50* " N. Latitude and 80^0 54' *53* " W. Longitude. However, ECI has represented in its application that the geographic coordinates of WCCZ are incorrect and that a correction to the WCCZ license file will be provided at a later date. ECI further notes that it proposes to increase the tower height for the WCCZ tower by 185 feet to an overall height of 341 feet above ground level (AGL) including lighting. However, we note that because ECI proposes to locate on an existing tower of a Commission licensee and because specific reference is made to this tower in various places in the application, the staff could, drawing on the application as a whole, verify the tower location by taking note of the site coordinates found in our files for WCCZ. Accordingly, ECI's application was found acceptable for filing. In addition, an air hazard issue will be specified below.

5. *Allard*. Information before the Commission indicates that Allard was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Allard's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Allard in this proceeding.

6. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
deHaro	April 12, 1989
Allard	November 23, 1988; July 10, 1989
Hill	May 15, 1989

7. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant below have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Allard would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Allard.

2. To determine whether Allard's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Allard possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine whether there is a reasonable possibility that the tower heights and locations proposed by deHaro, ECI, and Allard would constitute a hazard to air navigation.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That deHaro shall submit the amendment specified in paragraph 2 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by deHaro, Allard, and Hill ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in

such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] We note that Deborah J. Belz, President, Director, and 60% stockholder of ECI, is the Secretary and 40% stockholder of WCCZ and her husband, Robert H. Belz, is the President, Director, and 60% stockholder of WCCZ.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-246

In re Applications of

WARREN PRICE COMMUNICATIONS, INC. *et al.* File No. BPH-850712GV *et al.*

For Construction Permit
for a New FM Station in
Bay Shore, New York
Channel 276A

MEMORANDUM OPINION AND ORDER

Adopted: April 30, 1990; Released: May 10, 1990

By the Commission:

1. This proceeding involves mutually exclusive applications for a new FM broadcast station in Bay Shore, New York. On March 27, 1989, Long Island Music Broadcasting Corporation (LIMBC) filed a Petition for Reconsideration of *Warren Price Communications, Inc.*, 4 FCC Rcd 1992 (1989),[1] in which the Commission denied review of the dismissal of LIMBC's application.[2] On the same date LIMBC filed a Petition to Dismiss the remaining applications in this proceeding for alleged lack of reasonable assurance of a site. [3] These petitions are now before the Commission. Also before the Commission are: a Request for Investigation filed April 17, 1989 by LIMBC;[4] an Application for Review filed May 23, 1989 by LIMBC;[5] and a Petition to Delete Allotment and to Dismiss Applications filed September 13, 1989 by Buckley Broadcasting Corporation of Connecticut.[6] In a Memorandum Opinion and Order, *Warren Price Communications, Inc.*, 4 FCC Rcd 5095 (1989), the Commission found the foregoing pleadings raised serious questions concerning whether the remaining applicants continued to have reasonable assurance of site availability. The Commission stayed further proceedings and it directed the applicants and the Mass Media Bureau to file comments on the question of reasonable assurance of site availability.[7]

2. For the reasons that follow, we are denying reconsideration of the dismissal of LIMBC's application. We are also denying the Petition to Dismiss filed by LIMBC and dismissing the Petition filed by Buckley. We find, however, that there are serious questions concerning whether the remaining applicants have reasonable assurance of the availability of their proposed transmitter site. Consequently, we are adding a site availability issue against each of them. We also recognize that those applicants may amend their applications to specify new transmitter sites, subject to their establishing that they have satisfied the relevant elements of good cause for their amendments under 47 C.F.R. § 3522(b) and *Erwin O' Conner Broadcasting Co.*, 22 FCC 2d 140, 143 ¶ 7 (Rev. Bd. 1970). Finally, we are denying LIMBC's Request for Investigation and Application for Review.

I. BACKGROUND

3. Each of the applicants in this proceeding specified the Fire Island Lighthouse as a proposed antenna site. On February 15, 1989 the NPS granted LIMBC an exclusive 15 year lease for the lighthouse. The Commission found that the lease raised questions concerning the applicants' reasonable assurances of site availability. The parties were asked to comment on the site availability questions. In their comments, the remaining applicants asked for permission to file amendments proposing new sites. The new site specified by several applicants is short spaced with Station WDRC-FM, Hartford, Connecticut, which is licensed to Buckley.

4. LIMBC in its Petition for Reconsideration argues that the Commission erred in dismissing its application, that its application should be reinstated and that the Commission should grant its application because it is the only applicant with a viable transmitter site. In its Petition to Dismiss, LIMBC argues that the applications filed by the remaining applicants should be dismissed because they do not have viable transmitter sites and they never had reasonable assurance of site availability. The remaining applicants argue that they met the reasonable assurance standard and that LIMBC's lease with the NPS is an unforseen change in circumstances establishing good cause for authorizing them to amend their applications to specify new transmitter sites. Buckley argues that there are no applicants with reasonable assurance of a properly spaced site, that no properly spaced site is available, and that all of the applications should be dismissed and the channel allocation to Bay Shore deleted.

II. THE PETITION FOR RECONSIDERATION

5. In its Petition, LIMBC argues that the record does not support the dismissal of its application, that the Commission's actions reflect a bias against it, that its alleged deficiencies did not disrupt the proceeding or prejudice the other applicants, that it lacked notice that its application could be dismissed, and that the ALJ treated it disparately from applicants with similar deficiencies in the *WWOR - TV, Inc.* (MM Docket No. 88-382) proceeding. It further argues that it has an exclusive lease with the NPS for the only available transmitter site, and that to deprive it of the use of the site would be an unconstitutional appropriation of its property interest in the lease. All of these arguments are made in the context of its claim that no other applicant should have been permitted to apply for the Bay Shore channel, because only LIMBC has had any rights to the Fire Island Lighthouse site, and that the lighthouse is the only available site meeting the Commission's technical requirements. From this perspective, LIMBC argues that no other applicant has standing to seek the dismissal of its application and that LIMBC's application should be retained because it is the only one meeting the FCC's qualifying requirements.

6. LIMBC's arguments that its violations of the hearing procedures are not supported by the record and do not warrant dismissal of its application and that it lacked notice were fully considered in denying review and are

not entitled to further consideration. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (1965), *cert. denied*, 383 U.S. 967 (1966). Moreover, LIMBC has not presented new facts or changed circumstances relevant to its dismissal for procedural irregularities as required for reconsideration by 47 C.F.R. § 1.106(b)(2).

7. The only new circumstance alleged by LIMBC, the NPS lease, is not a relevant factor for reconsideration here. Although the lease may have an impact on the qualifications of the other applicants, deficiencies in the other applications do not establish any right of LIMBC to continued participation in this proceeding. In this regard, LIMBC confuses its private interest in the NPS lease, which it states it intends to use for non-broadcast communications purposes,[8] with the Commission's exclusive authority to issue broadcast licenses to qualified applicants. *See* 47 U.S.C. § 301. The Commission is not obligated to overlook a pattern of procedural irregularities or to grant LIMBC's application merely because it has an exclusive lease for the only available fully spaced site.

8. There is also no basis for LIMBC's allegations of bias. LIMBC's argues that in assigning a channel to Bay Shore, the Mass Media Bureau said that at the license application stage the Commission would not look with favor upon circumstances that effectively preclude more than one party from filing an application. *FM Channel Assignments*, 57 RR 2d 1275, 1279 (Mass Med. Bur. 1985). LIMBC asserts that this language reflected a bias against its application because of its exclusive lease rights under the terms of the National Historic Properties Act. According to LIMBC, the Bureau's hearing designation order accepting applications that merely "piggy backed" onto LIMBC's site and the ALJ's procedural orders also reflect this bias.

9. To be actionable bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). Nothing in the record, the Mass Media Bureau order allotting the Bay Shore channel, or the *HDO* suggests that an application from LIMBC would not be considered on the merits and nothing about the ALJ's dismissal order suggests that it was based on anything other than the record before him. *See Berger v. United States*, 255 U.S. 22, 31 (1921). Here, LIMBC's disqualification is grounded on evidence of its failure to comply with the Commission's procedural rules and the ALJ's rulings governing this proceeding. The Bureau orders about which LIMBC complains reflected only the Commission's long-standing policy of accepting and considering timely-filed competing applications from qualified applicants. *See* 47 C.F.R. § 73.3573(d) (time for filing mutually exclusive applications); *Ashbacker Radio Corp. V. FCC*, 326 U.S. 327 (1945) (mutually exclusive applications must be considered together). LIMBC's dealings with the NPS do not give it a vested interest in the preclusion of other applicants. We do not find any evidence of bias that would warrant overturning the dismissal of LIMBC's application.

10. LIMBC also accuses the Commission of bias alleging that the Commission misstated LIMBC's position. The Commission correctly found that LIMBC does not dispute that the problems recited by the ALJ occurred, and it noted LIMBC's explanation about those problems. What is disputed is the conclusion to be drawn from the problems and LIMBC's explanation about them. The Commission's agreement with the Review Board that the ALJ did not abuse his broad discretion in dismissing LIMBC's application does not demonstrate bias and prejudice against LIMBC.[9]

11. We also reject LIMBC's argument that it has not delayed the proceeding and that its actions have not been prejudicial to other applicants. Our denial of review was predicated on LIMBC's unacceptable conduct. 4 FCC Rcd at 1992-93 ¶¶ 4-6. LIMBC repeatedly failed to prosecute its application in a timely and expeditious manner. As we held in denying review, "prosecution of an application means timely compliance with procedural and substantive rulings, including ALJ's orders." *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419, ¶ 2 (1986). It was well within the ALJ's discretion to require LIMBC to adhere to the Commission's rules and his procedural orders in order to continue as a party in this proceeding.[10]

12. LIMBC also claims that the ALJ erred in dismissing its application because the ALJ failed to establish that its deficiencies resulted in "material prejudice" to the other parties, a standard LIMBC apparently derives from 47 C.F.R. § 1.47(g) which applies only to pleadings and service as discussed in note 9, *supra*. This argument is misplaced. Nothing in the FCC's rules requires an ALJ to tolerate all procedural deficiencies in an applicant's conduct that fall short of "material prejudice" to other applicants. The Commission has made clear that the public interest is served by expeditiously resolving comparative application proceedings so that the public can receive service. *See Hillebrand Broadcasting, Inc.*, 1 FCC Rcd at 419. The ALJ's discretion to control the conduct of the proceeding before him encompasses the discretion to dismiss the application of a party that burdens a proceeding by repeatedly failing to adhere to the governing procedures.[11]

13. The instant proceeding is also distinguishable from the ALJ's rulings in *WWOR - TV*, FCC 89M-607 (Admin. L. Judge Feb. 22, 1989) and FCC 88M-3813 (Admin. L. Judge Nov. 9, 1988). The deficiencies cited in *WWOR* involved two applicants. The ALJ did not disqualify an applicant that failed to appear at two prehearing conferences. That applicant did not receive notice of the first hearing conference. FCC 89M-607 at ¶ 19. The applicant advised the ALJ that it missed the second conference because of a scheduling error and it affirmed its interest in prosecuting its application. *Id.* at ¶ 24. The ALJ also did not disqualify a different applicant who filed an undated and allegedly incomplete integration and diversification statement, that had the signature of a principal but was not signed by counsel, as required by 47 C.F.R. § 1.52. FCC 88M-3813. The misconduct of each of the applicants in *WWOR*, at the time of the orders cited by LIMBC, was not as egregious as LIMBC's. At that time neither applicant had engaged in a continuing pattern of disregard for the Commission's procedures, as cited by the ALJ in this proceeding. *See* FCC 87M-2552 *supra*. Thus, the rulings in *WWOR* are not inconsistent with his dismissal of LIMBC in this proceeding and do not support LIMBC's allegations of prejudicial treatment. In any event, in *WWOR*, the ALJ dismissed the application for additional procedural deficiencies.[12]

14. LIMBC has attempted to discount its procedural deficiencies as *de minimis* because, in its view, it is the only rightful applicant for the Bay Shore channel. It would have the Commission excuse its conduct and re-

instate its application on the basis of this asserted entitlement to the channel. We do not accept this rationale. Neither disagreement with the finding in the designation order that the other applicants had a "reasonable expectation" of access to a site nor belief in the merits of its own position regarding the qualifications of the other applicants excuses LIMBC from complying with the procedural ground rules governing the hearing. Furthermore, Commission consideration of competing applications from qualified applicants and the Commission's expectation that LIMBC comply with procedural rules are not an unconstitutional appropriation of LIMBC's NPS lease. LIMBC was entitled to comparative consideration of its application on the merits, *see Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), as long as it continued to comply with the procedures governing its participation in the proceeding. Its application was dismissed because it did not comply. LIMBC's Petition for Reconsideration will be denied.

III. THE PETITIONS TO DISMISS

15. The Hearing Designation Order rejected LIMBC's argument that the other applicants lacked reasonable assurance of site availability. The Order found that the NPS "is prepared to initiate a new competitive proceeding for use of the Lighthouse" if LIMBC's application is not granted. *Warren Price Communications, Inc. (HDO)*, 2 FCC Rcd 4201, 4202 ¶ 4 (Mass Med. Bur. 1987). The *HDO* cited a letter dated November 27, 1985, from the NPS stating that its agreement with LIMBC was conditioned upon LIMBC securing an FM license. The NPS said that if LIMBC did not secure an FCC license it would initiate a new competitive proceeding for potential use of the lighthouse. *Id.*[13] On February 15, 1989, the NPS granted LIMBC an exclusive fifteen year lease for use of the lighthouse for "the use and operation of radio service." Lease p. 3, ¶ 3. *See Warren Price Communications, Inc.*, 4 FCC Rcd at 5095 ¶ 4.

16. In the instant Petition to Dismiss, LIMBC cites its lease with the NPS and renews its argument that the other applicants have lacked reasonable assurance of site availability from the beginning. In replying to the remaining applicants' comments on the Commission's June 16 order, it additionally argues that the parties have not shown good cause for amendments proposing new sites.

17. Responding to the Commission's June 16 request for comments on the issue of site availability, the parties question the validity of LIMBC's lease, in light of LIMBC's apparent change in its intended use of the lighthouse from the FM broadcast service specified in its 1983 lease commitment,[14] and they argue that the lease does not preclude FM broadcasting by one of them if LIMBC does not use the site for broadcasting. They also argue that they should be allowed to amend their applications to specify alternative sites. Some applicants contemplate using the tower of Standard Broadcast Station WLIX(AM), Islip, New York. However, Buckley Broadcasting Corporation of Connecticut, which is not a party to this proceeding, filed a Petition to Delete Allotment and to Dismiss Applications, alleging that the suggested WLIX(AM) site is short spaced with its facilities for station WDRC-FM, Hartford, Connecticut. Buckley also argues that there is no site other than the Fire Island Lighthouse that can meet the Commission's technical requirements, a point made repeatedly by LIMBC. The Mass Media Bureau filed comments recommending addition of site availability issues against each of the remaining applicants.

18. *Validity of the NPS Lease*: The arguments of the parties questioning the validity of the NPS lease are rejected. In a letter dated June 27, 1989, the NPS advised the Mass Media Bureau that it expects LIMBC to carry out the lease even if LIMBC is not awarded a license by the Commission.[15] There is nothing before the Commission that would cause the Commission to question the NPS's own determinations concerning the validity of its lease.

19. *Antenna Site Amendments*: Each of the remaining applicants asserts that it properly relied on the November 27, 1985 letter from the NPS and the Commission's findings that they had reasonable assurance of access to the Fire Island Lighthouse site. Each also maintains that there is good cause for allowing them to amend their applications. Price also argues that it has special equities because it had initially proposed a site other than the lighthouse. That site was short spaced with WDRC-FM. Relying on the Order allocating an FM channel to Bay Shore, and the November 27, 1985 letter from the NPS, Price amended its application to specify the lighthouse. Price asserts that LIMBC's lease was not foreseeable and that given the earlier rulings finding reasonable assurance, there is good cause for allowing it to amend its application to specify a new site. Price argues that it should be granted a reasonable period of time, of not less than 90 days, to file an amendment specifying a new site.

20. LIMBC asserts that the other applicants never had reasonable assurance of site availability because of LIMBC's exclusive commitment from the NPS. It argues that a commitment from the NPS is specifically required for the Bay Shore allotment by *FM Table of Assignments*, 25 FCC 2d 877 (1970). The National Historic Properties Act provides that a commitment can be made only through the competitive bidding process in which only LIMBC has participated. LIMBC argues that the other applicants did not have assurance that the NPS would initiate bidding for use of the lighthouse or allow its use for broadcasting if LIMBC's lease commitment had been terminated, that there are no other available sites because the NPS has objected to all plans to build radio towers on Fire Island other than at the lighthouse; and that the alternative WLIX(AM) site is short spaced with WDRC-FM. LIMBC argues that the other parties lacked diligence in amending their applications because they knew about LIMBC's lease with the NPS in March, 1989, but did not even look for alternative sites until after the Commission requested comments. LIMBC thus concludes that the other applicants should not be allowed to amend their applications.

21. We disagree with LIMBC's position. The remaining applicants had reasonable assurance of the lighthouse site at the time they filed their applications. When a site is controlled by a government agency, "a mere willingness by the government agency to entertain a request for the use of the land in question is sufficient to provide reasonable assurance of the site's availability." *Alden Communications Corp.*, 3 FCC Rcd 3937, 3938 ¶ 10 (1988). *See Teton Broadcasting Ltd. Partnership*, 1 FCC Rcd 518, 519-20 ¶ 11 (1986). Although the NPS' willingness to allow FM facilities at the Fire Island Lighthouse was established initially by LIMBC, nothing in the record shows that the NPS explicitly rejected the applicants' pro-

posals for the site until the NPS and LIMBC signed the lease on February 15, 1989, and the NPS Acting Regional Director advised the Mass Media Bureau in its June 27, 1989, letter, *supra*, that it considered the lease binding. *See Alden*, *supra*; *Teton*, *supra*. Indeed, as noted in the *HDO*, 2 FCC Rcd at 4202 ¶ 4, letters to several applicants from the Chief, Land Resources Division, NPS, clearly stated the NPS' willingness to initiate a new competitive bidding proceeding if LIMBC did not receive a license for a new FM station.[16] Given the lack of interest in using the lighthouse for non-broadcast purposes when the NPS held the first bidding proceeding, there was good reason to expect that the lighthouse would continue to be available for broadcast use, even if another competitive bidding proceeding had to be held.[17] The fact that LIMBC has greater assurance of the site than the remaining applicants did not undermine their qualifications at the time they filed their applications.[18]

22. However, now that LIMBC has entered into a lease with the NPS, the circumstances have changed and there is a substantial and material question of fact as to whether the applicants continue to have reasonable assurance of access to a site. Thus, we will designate a site availability issue against each of the remaining applicants. *See* 47 U.S.C. § 309(d); *see generally FM Applications*, 58 RR 2d 166, 169 (1985) (Public Notice).

23. The remaining applicants have filed or propose to file amendments with the ALJ and have asked the Commission to find good cause for these amendments. We recognize that applicants who initially had reasonable assurance of a site may amend their applications when changed circumstances eliminate that initial assurance. *See South Florida Broadcasting Co.*, 99 FCC 2d 840, 842 ¶ 3 (Rev Bd. 1984), citing *California Broadcasting Corp.*, 90 FCC 2d 800 (1982). However, we believe that, in the first instance, the ALJ rather than the Commission should evaluate the other aspects of the good cause showings accompanying the applicants' petitions for leave to amend including any submission by Price.[19] The ALJ is authorized to consider whether circumstances warrant designation of short spacing issues, and whether there is good cause for granting the applicants waivers of the short spacing rules. We further direct the ALJ to expedite the evidentiary hearing and the preparation of an Initial Decision.

24. *Buckley's Petition to Dismiss*: Lundborg and Kandel concede that their planned alternative site at the facilities of WLIX(AM) is short spaced with WDRC-FM. Buckley objects to any short spacing with its station and argues that Commission policy is to delete FM assignments when there are no properly spaced sites. It also asserts that there is no evidence of an overriding public need for a new station that would rebut the presumption favoring strict enforcement of the spacing rules and protection for WDRC-FM. If the applications are not dismissed, Buckley claims a right to an evidentiary hearing pursuant to 47 U.S.C. § 316 before its license is modified by short spacing.

25. The remaining applicants strongly object to Buckley's petition, arguing the equities of their long participation in this proceeding in reliance on the *HDO*'s finding of reasonable assurance, the pendency of petitions for leave to amend filed with the ALJ, and the *de minimis* nature of any overlap with WDRC-FM. The Bureau asserts that the applicants might be able to present facts warranting a waiver of the spacing requirements and that Buckley has not submitted engineering data showing objectionable interference.

26. Although the LIMBC lease with the NPS has eliminated the remaining applicants' reasonable assurance of a site on the current record, we are not persuaded that this fact supports deletion of the Bay Shore allotment. Whether the applicants can demonstrate their qualifications on the site availability issue being designated against them or demonstrate that waiver of the spacing requirements is warranted are questions to be explored before the ALJ, if the applicants make the specified good cause showing for amending their applications. Buckley's Petition to Dismiss, therefore, will be dismissed without prejudice to its right to seek intervention in further proceedings before the ALJ.

IV. THE REQUESTS FOR AN INVESTIGATION AND CANDOR ISSUES

27. *Lundborg and Kandel's Candor*: Lundborg and Kandel filed joint Comments alleging that they began searching for a new site within days of learning of the NPS lease. Comments filed July 31, 1989 at 9. The supporting declaration of Malcolm Kahn, Kandel's president, stated that he took steps to find a new engineer shortly after the release of the Commission's order requesting comments, and that he met with a realtor and a number of other persons in search of possible sites. Kahn admitted that most of these efforts were fruitless, but noted that he was able to obtain a letter from the manager of station WLIX, stating that WLIX would allow Kandel to place an FM antenna on its tower. Comments, at Attachment D.

28. LIMBC charges that Lundborg and Kandel filed a deceptive pleading misrepresenting their efforts to find a new site. It asserts that Kandel was advised of the NPS lease in March 1989. The Commission's order requesting comments was not released until June 16, 1989. Kahn did not meet with a realtor until July 25, 1989. LIMBC thus argues that Kahn did not begin searching for a site when Kandel first became aware of LIMBC's lease as represented in its Comments, and that Lundborg and Kandel were deceptive in characterizing Kahn's meetings with owners of other possible sites as negotiations. According to LIMBC, a meeting with a representative of the New York Technical Institute was not a scheduled appointment; Kahn incorrectly identified the person with whom he spoke and the title of a representative of the Town of Islip; and Kahn requested New York State Officials to keep his correspondence confidential.

29. The above allegations do not make a prima facie showing of any misrepresentation or lack of candor on the part of Lundborg and Kandel. Kahn's declaration made a full disclosure of the facts. It is readily apparent from reading the entire pleading that Kahn fully disclosed when he initiated his efforts to locate a new site and that he did not conceal or intentionally misrepresent his efforts to find a new site. Kahn met with representatives of the organizations listed in his declaration. Kahn's declaration also admitted that most of those contacts never progressed beyond the status of preliminary inquiries and that with the exception of his negotiations with WLIX, those inquiries were fruitless. Under these circumstances, the fact that Kahn misidentified the person from the Town of Islip with whom he talked, or the fact that his meeting with a representative of the New York Institute of

Technology was "not a scheduled appointment," do not meet the threshold requirement for a hearing. *See Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988); *Citizens for Jazz on WRVR, Inc.*, 775 F.2d 392, 394 (D.C. Cir. 1985).

30. *The Request for Investigation*: In pleadings filed on April 5, 10 and 11, 1989, counsel for Lunborg, Kandel, Fire Island Broadcasting, and RPS represented that they were unable to ascertain with certainty whether LIMBC's Petition for Reconsideration and Petition to Dismiss had been filed with the Commission. LIMBC asserts that on April 13, 1989, its counsel ascertained that its pleadings had been received by the Mail Branch, and sent to the Fee Section. The Fee Section advised Counsel that the documents were logged in on March 27, 1989, and were subsequently forwarded to the Dockets Branch.

31. Counsel for Lundborg, in a letter dated April 14, 1989, advised the Commission that she was still unable to locate the filings. On April 18, 1989 Lundborg filed a letter, with copies of a computer readout of the Commission's docket history to document her inability to verify the filings. The filed copy of the readout of the history was incomplete, in that the dates showing when the history was accessed were partially deleted.[20] The April 18 letter also stated that there had been "contacts among the applicants in conjunction with their good faith efforts to ascertain the status of the LIMBC pleadings." Letter, dated April 18, 1989 at n.2. Lundborg asserts that a computer readout of the docket history on April 10, 1989 established that LIMBC's pleadings had not been recorded on the dockets history record and that from April 10 through April 14, 1989 a paralegal routinely checked the history record, the Dockets Branch and the Secretary's Office and, based on that research, counsel believed that LIMBC's pleadings had not been filed.

32. LIMBC asserts that because it was able to ascertain that the pleadings were filed on April 13 and that Lundborg's own documentation showed a search of the Commission's records only on April 10 or earlier, that Lundborg's April 14 and 18 letters misrepresented its efforts to search the Commission's files. LIMBC asserts that the applicants were represented by experienced counsel and questions "whether these mass failures to locate documents . . . is a singular coincidence or perhaps more?" LIMBC Request for Investigation at p. 4. Noting that the pleadings do not deny the filings, LIMBC asserts that the parties filed "artful precise imprecise pleadings [that] appear to have been crafted in such a way that one would question whether there was concert" among the parties. *Id.* at p.5. LIMBC asks the Commission to investigate the conduct of the applicants to determine the "extent to which the other parties participated in the obvious deception," and whether they filed false and misleading pleadings and engaged in prohibited *ex parte* communications. LIMBC Supplement to Opposition for Extension and Request for Investigation, filed April 20, 1989, at p. 5.

33. LIMBC's pleadings were misdirected by the Mail Branch to the Fee Section. Although the Fee Section forwarded the pleadings to the Dockets Branch, a readout of the docket history established that the pleadings had not been recorded as of April 10, 1989. The fact that on April 13, 1989 LIMBC was able to verify that the pleadings were properly filed with the Commission does not establish that the other applicants knew when the pleadings had been filed, or that they should have been able to ascertain that LIMBC's pleadings were properly filed before they requested extensions of time. Given the confusion caused by the failure of the Commission's staff to properly route and record the filing of LIMBC's pleadings, and recognizing that the applicants might have been able to locate the pleadings if they started their search with the Mail Branch, instead of with Dockets or the Secretary, the normal depositories for pleadings in docketed cases, LIMBC's assertions do not raise a substantial and material question of fact concerning the remaining applications. *See Astroline Communications, supra*; *Citizens for Jazz, supra.*[21]

34. Lundborg represented on April 14 that her counsel had not been able to verify when the pleadings were filed. Although that representation was supported by documentation indicating that the docket history may have been accessed on April 6 or 10, Lundborg explained that the information was subsequently verified by a paralegal. These facts do not raise a question of decisional significance concerning whether Lundborg has been candid in her April 14 and 18 letters, and in her opposition to the request for investigation. Thus, we will not designate an issue to determine if Lundborg was candid in describing her efforts to verify LIMBC's filings.

35. We also refuse to initiate an inquiry into whether the other applicants engaged in a concerted action to file false and misleading pleadings. There is no basis for designating candor issues concerning their pleadings and there was nothing improper about the applicants consulting on their efforts to verify whether LIMBC's pleadings had been filed. Finally, LIMBC's arguments that other applicants might have been parties to Lundborg's alleged lack of candor, are based on speculation and surmise and are insufficient to warrant further inquiry.

36. ACCORDINGLY, IT IS ORDERED, That the issues designated for hearing ARE ENLARGED and that the presiding Administrative Law Judge shall conduct further hearings on an issue:

To determine if applicants Warren Price Communications, Inc., Bay Shore Community Broadcast Associates, Ltd., Bay Shore Broadcasting Corporation, Fire Island Broadcasting, Kandel Broadcasting Corporation, RPS Communications, Susan Lundborg and South Shore Media Corporation have reasonable assurance of the availability of their proposed antenna sites;

37. IT IS FURTHER ORDERED, That the ALJ IS DIRECTED to expedite the evidentiary hearing order in this proceeding and the preparation of the initial decision.

38. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed March 27, 1989 by Long Island Music Broadcasting Corporation, IS DENIED.

39. IT IS FURTHER ORDERED, That the Petition to Dismiss filed March 27, 1989 and the Supplement to Petition to Dismiss filed August 21, 1989 by Long Island Music Broadcasting Corporation ARE DENIED.

40. IT IS FURTHER ORDERED, That the Request for Investigation filed April 17, 1989 by Long Island Music Broadcasting Corporation IS DENIED.

41. IT IS FURTHER ORDERED, That the Application for Review filed May 23, 1989 by Long Island Music Broadcasting Corporation IS DENIED.

42. IT IS FURTHER ORDERED, That the Petition to Delete Allotment and to Dismiss Applications filed September 13, 1989 by Buckley Broadcasting Corporation of Connecticut IS DISMISSED.

43. IT IS FURTHER ORDERED, That the Motion to Dismiss filed September 23, 1989, by Fire Island Broadcasting IS DISMISSED as moot.

44. IT IS FURTHER ORDERED, That the stay granted by the Commission in a Memorandum Opinion and Order, 4 FCC Rcd 5095 (989) IS DELETED, and that the ALJ IS AUTHORIZED to conduct further proceedings in accordance with this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Oppositions to the Petition for Reconsideration were filed April 6, 1989 by Warren Price Communication, Inc., April 24, 1989 by Susan Lundborg, April 28, 1989 by Fire Island Broadcasting, May 1, 1989 by Bay Shore Community Broadcast Associates, Ltd. and by RPS Communications, and May 4, 1989 by Kandel Broadcasting Corporation. LIMBC filed a Reply on May 15, 1989.

[2] The Commission denied review of *Warren Price Communications, Inc.*, 2 FCC Rcd 7409 (Rev. Bd. 1987), *affirming* 98M-2552 (Admin. L. Judge, Oct. 13, 1987).

[3] Oppositions were filed April 6, 1989 by Warren Price, April 11, 1989 by South Shore Media Corporation, April 20, 1989 by Bay Shore Community, April 24, 1989 by Lundborg, April 28, 1989 by Fire Island, May 1, 1989 by RPS, and May 4, 1989 by Kandel. LIMBC filed Replies on April 19 and 24, and May 1, 8 and 9, 1989. Bay Shore Community filed an Opposition on May 4, 1989. LIMBC filed a Supplement to Petition to Dismiss on August 21, 1989. LIMBC in its May 1, 1989 Reply argues that Bay Shore Community's April 20, 1989 Opposition is untimely. LIMBC's argument is without merit. By Memorandum Opinion and Order, FCC 89I-30 (OGC April 21, 1989), the time for the applicants to reply to LIMBC's Petitions for Reconsideration and to Dismiss was extended. Accordingly, Bay Shore Community's April 20, 1989 Opposition was timely filed.

[4] The request was supplemented by LIMBC on April 20, 1989. Kandel filed a Reply on April 21, 1989. Oppositions were filed on April 24, 1989 by Lundborg and on April 26 by RPS, and Replies were filed on May 3, 8 and 9 by LIMBC.

[5] LIMBC requests review of the order of the General Counsel (89I-30, released April 21, 1989), granting requests for extensions of time to file oppositions to LIMBC's Petition for Reconsideration and Petition to Dismiss.

[6] Oppositions were filed on September 22, 1989 by Price and by RPS, on September 26, 1989 by Kandel, and on September 27, 1989 by Lundborg, by South Shore Media and by the Bureau. On September 26, 1989, Fire Island file a Motion to Dismiss Buckley's petition. On October 16, 1989, Buckley filed a Reply.

[7] Comments were filed on July 31, 1989 by Price, Bay Shore Community, RPS, Fire Island, Kandel and Lundborg, and the Bureau. On August 2, 1989 the Bureau filed an Erratum. Reply comments were file August 7, 1989 by Fire Island and by RPS, and on August 9, 1989 by LIMBC. On August 14, 1989 LIMBC supplemented its reply pleadings.

[8] LIMBC asserts that it will use the Lighthouse as a transmission link for a satellite radio network to provide television service to cruise ships. LIMBC, Response to Warren Price Communications, Inc.'s Opposition to Petition for Stay, filed May 1, 1989, Exh. 1.

[9] LIMBC specifically argues that the ALJ should have excused failings regarding service of pleadings or certificates of service unless he affirmatively found that parties suffered "material prejudice" from those failings. However, LIMBC misreads 47 C.F.R. § 1.47(g) upon which it relies for this position. Section 1.47(g) permits, but does not require, the Commission to accept amendments or late filing of a proof of service "unless to do so would result in material prejudice to a party." Section 1.47(g) does not preclude consideration of problems with LIMBC's proof of service as part of the whole record of procedural deficiencies upon which the dismissal order is based.

[10] In denying review of the Board's order, we noted that "eighteen applications were designated for hearing." 4 FCC Rcd at 1992 ¶ 4. LIMBC argues that this reflects bias because it incorrectly states the number of applicants who proceeded to hearing. LIMBC, Petition for Reconsideration, filed March 27, 1989, p. 3. The statement in our Memorandum Opinion and Order was correct. Eighteen applications were designated, and eighteen applicants were in the proceeding when the ALJ issued his Order Prior to Hearing, FCC 87M-1711, on July 20, 1987. No applicant withdrew until August 5th, when the integration statements were due. FCC 87M-1832 (Aug. 5, 1987). By the September 9th prehearing conference, eight applicants had withdrawn, after having had a chance to review the strengths of their integration proposals. FCC 87M-1857 (Aug. 7, 1987); FCC 87M-1904 (Aug. 12, 1987); FCC 87M-2121 (Sept. 8, 1987). A ninth applicant withdrew on October 8th, leaving nine parties in the proceeding. FCC 87M-2500 (Oct. 8, 1987) (partial settlement). The ALJ considered strict adherence to the procedural dates "essential . . . in a multi-party case of these dimensions in order to effectively manage the case and, even more importantly, to be sure that one party does not gain an advantage over its competing applicants . . . ." FCC 87M-2552 at ¶ 2 n. 3 (released Oct. 13, 1987). We continue to agree with this observation of the ALJ.

[11] LIMBC supports its allegation of prejudice by arguing that the real delay in this proceeding has been caused by the site problems of the other applicants, whose applications have not been dismissed. This argument simply reiterates LIMBC's disagreement with the earlier decision to accept competing applications from applicants specifying the same Fire Island Lighthouse site that LIMBC specified, but it does not establish that the ALJ, Review Board, or Commission were biased in refusing to tolerate LIMBC's disregard for the procedural requirements specified for this proceeding.

[12] The ALJ's dismissal was based on the applicant's failure to attend the two prehearing conferences, the failure to comply with an order to produce documents, the failure to respond to correspondence and be available for telephone calls, the failure to heed an order to mail an opposition pleading expeditiously, untimely filings, the failure to serve a pleading on one of the parties, and the filing of unauthorized pleadings. *WWOR - TV, Inc.*, FCC 89M-2206 (Admin. L. Judge Sept. 6, 1989), *aff'd*, 4 FCC Rcd 8127 (Rev. Bd. 1989), *app. for rev. pending*.

[13] The NPS Regional Director reiterated this point in his August 13, 1987, letter to counsel for LIMBC, which is attached as an exhibit to LIMBC's Supplement to Petition to Dismiss filed August 21, 1987.

[14] Fire Island urges the Commission to require LIMBC to file an application for renewal of its license for Station WLIM, Patchogue, N.Y., pursuant to 47 C.F.R. § 73.3539(c), in order to develop information relevant to the availability of the lighthouse. Section 73.3539 authorizes the Commission to order a licensee to file a renewal application before it is due for renewal. However, we will deny Fire Island's request. The lease, the NPS procedures, and LIMBC's written filings with the NPS are all matters of public record and there is no evidence that LIMBC has engaged in any conduct warranting an order directing it to file an early renewal application for WLIM.

[15] Steven H. Lewis, Acting Regional Director, National Park Service, letter to Paulette Laden, Mass Media Bureau Counsel, attached to the Mass Media Bureau's Comments Regarding Site Availability, filed July 31, 1989.

[16] This willingness to entertain bids distinguishes this case from *FM Table of Assignments*, 25 FCC 2d 877, 882 (1970), in which the Commission deleted an allotment for Bay Shore after the Interior Department through the NPS indicated that it was "'unalterably opposed'" to the assignment. Use of the allotment at that time would have required construction of a 300 foot tower on Fire Island, there had been no contacts with the NPS before the allotment had been made, the National Environmental Policy Act had just been passed, and the National Historic Properties Act governing the NPS decision-making about the lighthouse site had not been passed. The fact that the site is controlled by a government agency and the nature of the contacts with the NPS also distinguish this case from *Houston Family Television, Ltd.*, 101 FCC 2d 661 (Rev. Bd. 1985), cited by LIMBC. There the applicant's general partner had a single telephone conversation with the daughter of the agent/trustee for the desired commercial site. That conversation only concerned the availability of the property and was followed up by a letter from the general partner to the daughter stating his understanding that she would be willing to negotiate a lease. There were no discussions or negotiations, however, that would lead the applicant to believe that it would be able to lease the site under satisfactory terms. In contrast, because the NPS is a government agency, which has a history of making sites available to applicants at reasonable rates, after the grant of a license, the Commission only requires applicants proposing to use Park Service land, to show that the NPS will be willing to grant access. *Alden Communications*, 3 FCC Rcd 3937, 3938 ¶ 10 (1988).

[17] *National Innovative Programming Network*, Inc., 2 FCC Rcd 5641 (1987), cited by LIMBC, does not require a different result. The 1985 letters from the NPS stating its willingness to initiate a competitive bidding proceeding pursuant to the National Historic Properties Act were sufficient under the circumstances of this case to provide "some indication of the property owner's favorable disposition toward making an arrangement with the applicant." *Id.* at 5643 § 11.

[18] LIMBC's effort to distinguish *Alden* on the basis of its lease commitment is misplaced. Under the Communications Act, the Commission, not the NPS, must decide matters of broadcast station licensing. 47 U.S.C. § 301. Furthermore, LIMBC has found itself in precisely the predicament that concerned the Commission in *Alden; i.e.*, it now has a binding commitment for a site without having a construction permit for a broadcast station on that site. Its willingness to procure a lease commitment does not trigger an obligation on the part of the remaining applicants to demonstrate actual rather than reasonable assurance.

[19] For the elements of good casue, *see* 47 C.F.R. § 73.3522(b); *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d at 143 ¶ 7.

[20] It appears from the face of the document, however, that the docket history was accessed on April 6 or April 10, 1989.

[21] LIMBC further charges that, when Kandel advised LIMBC that it was requesting an extension of time, Kandel failed to disclose that it had been unable to locate pleadings or that it was requesting an extension for all parties. It argures these failures to disclose are futher evidence of Lunborg's and Kandel's lack of good faith. Lundborg advised LIMBC that it was requesting an extension of time and we are unaware of any requirement that Lundborg further advise LIMBC of the content of its pleading before it was filed. Thus, LIMBC's argument concerning the lack of good faith is without merit.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-244

In re Applications of

REBECCA RADIO OF MARCO	File No. BPH-850711OB
EMERALD SEA BROADCASTING, INC.	File No. BPH-850712OF
AFFIRMATIVE BROADCASTING CORPORATION	File No. BPH-850712TX
SHOWCASE COMMUNICATIONS, INC.	File No. BPH-850712UB
MARCO MINORITY ASSOCIATES	File No. BPH-850712UA
SUSAN G. & WILLIAM R. GASTON	File No. BPH-850712UE
MARCO SKYWAVE, INC.	File No. BPH-850712UH

For Construction Permit for a
New FM Station on Channel 224A
in Marco, Florida

MEMORANDUM OPINION AND ORDER

Adopted: April 30, 1990; Released: May 10, 1990

By the Commission:

1. In a case of first impression, the Commission approved a pre-hearing settlement awarding a construction permit for a new FM station on channel 224A in Marco, Florida to non-party Rowland Gulf Radio, Inc.[1] Under the agreement, the non-party would be substituted for one of the original applicants, and the remaining applications would be dismissed. By its February 8, 1990 Order, the Commission granted reconsideration on its own motion, reversed the earlier decision approving the Rowland agreement, and returned the above-captioned proceeding to active hearing status.[2] Having decided to disapprove the agreement on policy grounds, the Commission dismissed as moot timely filed petitions for reconsideration that challenged the Commission's authority to approve the agreement. [3]

2. Based upon our review of the pleadings before us,[4] we find that that action was legally correct, and that there are no special equities for exempting the Rowland agreement from our decision not to approve third-party agreements prior to hearing. We therefore deny reconsideration.[5] Notwithstanding Rowland's claim, the 1990 order rejecting the settlement agreement is not arbitrary or capricious. Having tentatively approved the agreement in hopes of expediting service to the public and ending costly, time-consuming lititgation,[6] the Commission found on reconsideration that its approval would create an economic incentive for the filing of sham applications that would disserve the public interest. The potential for future abuse was deemed "particularly acute" in approving settlements reached "early in the proceeding before hearings began and . . . substantial time and money [was invested] in securing a construction permit."[7]

3. By disapproving the agreement on this rationale, the Commission effectively granted the relief requested by United Church of Christ's earlier petition for reconsideration. Having done so, the Commission was not obliged, as UCC argues, to also address other arguments in its petition for reconsideration as to the agreement's legality. Nor is Rowland correct that the Commission's February 8, 1990 Order is arbitrary and capricious as applied to Rowland because it cites no evidence of abuse by Rowland or any party to the agreement. The transaction proposed by Rowland was unprecedented. In 1989, the Commission, faced for the first time with a pre-hearing settlement awarding the permit to a third-party, tentatively approved the agreement as a way of expediting service to the public and avoiding potentially expensive, time-consuming hearings. Due to the filing of timely petitions for reconsideration in February 1989, however, the tentative conclusion that approval of the Rowland agreement would serve the public interest never became final.[8]

4. We realize that those petitions for reconsideration were not acted on until almost one year later.[9] As expedited service to the public is an important public interest objective, it is not our intent to penalize permittees for taking steps to get service on the air as soon as possible following the grant of a construction permit. But it is well established that parties to a settlement agreement (or other transaction) who consummate that transaction before its approval becomes final assume the risk of the agreement ultimately being disapproved by the Commission or a reviewing court.[10] Assumption of this risk does not affect the Commission's ability to reconsider a non-final action.

5. In this regard, the Commission has an affirmative duty under 47 U.S.C. § 311(c) to approve only those settlements that are "consistent with the public interest, convenience, or necessity." Having never finally decided that approval of this unprecedented agreement would serve the public interest, the Commission cannot be compelled to disregard that statutory duty and reaffirm its non-final approval of an agreement that it now believes will disserve the public interest.[11] Concerned with the potential for future abuse, the Commission reasonably concluded on reconsideration that allowing the Rowland agreement to stand would create a precedent encouraging others to file sham applications in the future. Implicit in this finding was the concern that, given the potential for litigation in this controversial area, allowing even that one agreement to stand might lead others, who filed third-party agreements before the reconsideration order, to expect an exemption from the general prohibition against such agreements prior to hearing.

6. Given the unprecedented nature of the Rowland agreement, it was not entirely reasonable for Rowland to infer, either from the Bureau's continued support of the

agreement[12] or the Commission's delay in acting on the petitions for reconsideration.[13] that the Commission was disposed to deny those outstanding petitions. Thus, Rowland's voluntary assumption of the risk of consummating the transaction under these circumstances creates no compelling equities[14] that favor exempting the Rowland agreement from our determination to reject such third-party settlements.[15] Having determined that our reversal order was not arbitrary or capricious, procedurally defective or contrary to Commission precedent, and that no special equities warrant allowing the Rowland agreement to stand, we deny both petitions for reconsideration and reaffirm our decision returning the above-captioned adjudicatory proceeding to active hearing status.

7. ACCORDINGLY, IT IS ORDERED, That the petitions for reconsideration, filed March 22, 1990, by Rowland Gulf Radio, Inc. and by Office of Communication of the United Church of Christ ARE DENIED; that the Motion to Strike Reply to Opposition to Petition for Reconsideration, filed April 20, 1990, by United Church of Christ, the Request for Stay To Take Effect March 30, 1990, filed March 22, 1990, by Rowland Gulf Radio, Inc., and the Petition for Leave to File Supplement to Request for Stay, filed April 4, 1990, by Rowland Gulf Radio, Inc. ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Rebecca Radio of Marco*, 4 FCC Rcd 830, 831 ¶ 11 (1989).

[2] *Rebecca Radio*, 5 FCC Rcd 937 (1990).

[3] *Id.* at 937-38 ¶ 5.

[4] Petitions for reconsideration were filed on March 22, 1990 by Rowland Gulf Radio, Inc. (Rowland), and by Office of Communication of the United Church of Christ (UCC). On March 22, 1990, Rowland also filed Request for Stay to Take Effect March 30, 1990, and a Petition for Leave to File Supplement to Stay Request on April 4, 1990. The UCC and the Bureau opposed the stay request on March 27, 1990 and March 29, 1990, respectively. On April 4, 1990, the Bureau filed an opposition to Rowland's petition for reconsideration. On April 5, 1990, UCC and two individuals residing in the Marco, Florida area have also jointly filed an opposition to Rowland's petition for reconsideration. Rowland filed a Reply on April 17, 1990, which UCC moved to strike on April 20, 1990.

[5] Rowland requests that, pending action on its petition for reconsideration, we stay the effectiveness of our February 8, 1990 order so that it may begin broadcasting pursuant to program test authority on March 30, 1990. In view of our action herein denying reconsideration, we will dismiss the stay request as moot. We therefore have not considered, and express no opinion on whether, Rowland could meet its heavy burden of demonstrating the need for a stay under the traditional test set forth in *Virginia Petroleum Jobbers Ass' n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[6] *Rebecca Radio of Marco*, 4 FCC Rcd at 832 ¶ 19 (1989).

[7] *Rebecca Radio of Marco*, 5 FCC Rcd at 937-38 ¶ 5.

[8] There is no merit to Rowland's various claims that the 1989 approval became final. Whether petitioners had standing to seek reconsideration (a matter not addressed in the February 8, 1990 Order), their timely filed petitions for reconsideration tolled the 30-day period that the Commission has to reconsider an action "on its own motion" under 47 C.F.R. § 1.108. *See Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 48 n.51 (D.C. Cir. 1979). Thus, the order is valid despite the Commission's more than 30-day delay in granting reconsideration. Nor is it critical that the non-final award to Rowland was without a hearing. As the Commission granted reconsideration on its own motion, the 90-day period for acting on petitions for reconsideration of grants without a hearing contained in 47 U.S.C. § 405(a) does not apply. Even if this provision did apply, Rowland cites no precedent for its claim that the Commission's failure to act within the 90-day time period in this hearing proceeding constitutes a denial of the petitions for reconsideration or otherwise finalized the award to Rowland. In any event, the Commission has discretion under section 405. Cf. *Citizens Committee v. FCC*, 436 F.2d 263 n.5 (D.C. Cir. 1970).

[9] That the award of a construction permit to Rowland remained subject to reconsideration distinguishes this case from *Centreville Broadcasting Company*, 33 FCC 2d 623 (1972), cited by Rowland as precluding the Commission from revoking its construction permit and returning this case to active hearing status. That case, unlike the one before us, dealt with the circumstances under which the Commission, faced with allegations challenging the propriety of an award that has become final, should take an operating station off the air.

[10] *See Arnold L. Chase*, FCC 89-366, 5 FCC Rcd _____, _____ ¶ 2 (released Mar. 14, 1990), citing *Improvement Leasing Co.*, 73 FCC 2d 676, 684 (1979), aff'd sub nom. *Washington Ass'n of Television and Children v. FCC*, 665 F.2d 1264 (D.C. Cir. 1981).

[11] *Washington Association for Television and Children v. FCC*, 665 F.2d 1264, 1268 (D.C. Cir. 1981), in which the court held that the Commission could not be compelled to apply a policy that "it determined . . . no longer serves the public interest."

[12] Rowland relies on the Bureau's November 16, 1989 Supplemental Comments supporting the Rowland Agreement and its October 12, 1989 issuance of a modified construction permit to Rowland.

[13] As a party to the settlement, Rowland had notice of the fundamental questions raised by the petitions for reconsideration. To the extent that *any* inference may be drawn from the Commission's delay in acting on the petitions, this should have alerted Rowland to the difficult and complex policy issues facing the Commission.

[14] Rowland alleges no specific, significant injury that cannot be recovered. To the extent that Rowland paid the dismissing applicants $1,000,000, it can seek rescission of the agreement and return of the money. As to the expenditure of funds for construction, the built facility can presumably be sold to the ultimate permittee for channel 224A. Indeed, before closing, Rowland entered into an agreement providing that the ultimate permittee would lease the built facility from Rowland.

[15] Rowland claims that the listening public, having been lead to expect new service on March 30, 1990, will be disappointed by our decision in this case. As that disappointment stems directly from Rowland's mistaken belief that we could not legally reverse the non-final grant to Rowland, it affords no basis for letting an agreement that will disserve the public interest stand. Our rejection of the Rowland agreement will not deprive Marco of an existing service. Thus, *Arnold L. Chase*, FCC 89-366, 5 FCC Rcd _____ (March 14, 1990), cited by

Rowland, is inapposite. There, the parties to the sale of an existing station went to closing before approval of the transfer of control became final. Before the transfer order became final, the Commission specified issues against the buyer but determined that "the public interest w[ould] be served by permitting [the buyer] to retain control of the station during the course of the hearing." *Id.* at ¶ 30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-234

In re Applications of

CHARISMA BROADCASTING CORPORATION	File No. BPCT-850207KG
ARLINGTON 68 TV, INC.	File No. BPCT-850418KZ
UNITED BROADCAST GROUP, LTD.	File No. BPCT-850419KE
SOUTHWEST COMMUNICATIONS, LTD.	File No. BPCT-850419KO
JOHNSON TELEVISION, LTD.	File No. BPCT-850422KG
BRISCOE BROADCASTING, LTD.	File No. BPCT-850422KH
CHANNEL 68, NORTH TEXAS TELEVISION LIMITED PARTNERSHIP	File No. BPCT-850422KI
METROPLEX COMMUNICATIONS, INC.	File No. BPCT-850422KP
SAMMY A. THORNTON	File No. BPCT-850422KR
NATIVE AMERICAN BROADCASTING COMPANY, A LIMITED PARTNERSHIP	File No. BPCT-850422KU

For Construction Permit
for a New Television Station
Arlington, Texas

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1990; Released: May 10, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. By *Memorandum Opinion and Order*, 5 FCC Rcd 561 (Rev. Bd. 1990) (*Supplementation Order*), we directed Channel 68, North Texas Television Limited Partnership (North Texas) to supplement the record with those documents it originally relied upon to support its financial certification and those it currently relies upon to demonstrate its basic financial qualifications. On February 20, 1990, North Texas responded by filing a "Supplemental Financial Showing" (SFS). Comments on this showing were then filed by competing applicants Charisma Broadcasting Corporation (Charisma), Arlington 68 TV, Inc. (Arlington 68), Southwest Communications, Ltd. (Southwest), and Native American Broadcasting Company, A Limited Partnership (Native American). For the reasons set out below, we remand for a hearing on a financial qualifications issue.

2. Our *Supplementation Order* observed that exceptions filed by several of the applicants challenged the purported bank financing of North Texas, the winner below, and questioned whether that applicant possessed merely an "accommodation" letter insufficient to provide "reasonable assurance." More specifically, we recounted that the record revealed that North Texas' financial certification was based on verbal assurances provided by a financial institution that it would issue a "reasonable assurance" letter. At hearing, North Texas claimed to have relied upon Mark Stabler, its 17.5% "limited" partner, to obtain that letter. Stabler testified that he disclosed to the bank selected financial information which did not include the financial statements of the "limited" partners. Then, according to Stabler, the bank sent Stabler a letter discussing a loan to North Texas. *See id.* at 562.

3. Now, in its supplemental financial showing, North Texas revealed, for the first time, that no loan from a bank or other financial institution was ever contemplated by it. Instead, North Texas claims that, in certifying the application on April 22, 1988, its "general" partner Gloria Castro relied upon Stabler's oral assurances that he would arrange "Private Placement Debt Financing" of $2.5 million through the investment banking firm Piper, Jaffray and Hopwood, Inc., with which Stabler was associated, and that Stabler had identified an individual investor, Elaine Coles, who would provide the funding. North Texas SFS at 2-4 & Att. I.

4. Nonetheless, in a letter dated May 10, 1985 and signed by Stabler, Piper Jaffray wrote Castro that "it believed that under a Private Placement Debt Financing, funds would be available to enter into an arrangement with [North Texas] for the principal amount of $2,500,000." *Id.*, Att. E. This letter specified a seven-year period for repayment of the loan, an interest rate of 3% over the prime rate, and security for the loan (consisting of a security interest in equipment plus the personal guarantee of the "general" partner). However, this letter did not promise that the investment banker would assume the obligation to make the loan, if the private investor backed out.

5. Furthermore, the record as supplemented by the SFS does not contain any written "reasonable assurance" pledge of financing from Coles, the putative investor, or any financial statement of Coles demonstrating her ability to fund the loan. Instead, North Texas has submitted the written declaration of Stabler, who avers that, prior to his May 10, 1985 "reasonable assurance" letter to Castro, he:

> provided the construction and operational budgets for North Texas to Ms. Coles as well as the resume and financial statement of Ms. Castro. I discussed the project with her, and advised her of the risks involved in lending money to a start-up television station. Ms. Coles agreed to be the source of the

> Private Placement Debt Financing for the North Texas project in the amount of $2.5 million on the terms set forth in the letter issued by Piper Jaffray dated May 10, 1985 and signed by me.

North Texas SFS, Att. I at 2. Stabler further avers that:

> In February, 1990, I was notified by communications counsel that North Texas had been directed to demonstrate its financial qualifications at the time of filing its application as well as currently. I received a revised budget for the station, as well as updated market information and updated financial projections. I sent these materials to Ms. Coles and have discussed them with her. She is presently reviewing the materials to determine whether she is still willing to provide financing for North Texas's proposed station.

Id., Att. I at 3-4. Then on April 2, 1990, North Texas filed a "Motion for Leave to Amend," reporting in its accompanying amendment that:

> 1. After reviewing a revised budget and other updated information regarding the current market conditions of the Dallas/Fort Worth television market and after several conversations with Mr. Stabler, Ms. Coles informed Mr. Stabler on March 2, 1990, that she was no longer willing to provide financing to North Texas for its proposed television station.
>
> 2. North Texas is in the process of securing a new funding source . . . .

However, no indication is provided as to what specific changes in North Texas' underlying financial posture contributed to Coles' change of heart. In this connection, we observe that North Texas' "new operational and construction budget" of $2,353,788 (*id.*, Att. A at 9) was substantially unchanged from its original budget of $2,315,831 (*id.*, Att. A at 5-6).

6. The pleadings presently before us (even if accepted as verified) raise substantial and material questions of fact about North Texas' basic financial qualifications, and they cast considerable doubt on the original financial certification signed by North Texas principal Gloria Castro. As the Commission has recently noted in reaffirming its financial qualifications standards:

> [A] broadcast applicant . . . must have reasonable assurance of having sufficient funds to construct the proposed station and operate it without revenue for three months *before* the applicant certifies its financial qualifications. In other words, the applicant may not certify its financial qualifications and then arrange financing. *Pepper Schultz*, 103 FCC 2d 1052, 1058-59 ¶ 11 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1476 (1987), *recon. granted in part*, 3 FCC Rcd 1200 (1988).

* * *

> In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. To establish the availability of funds to meet these estimated expenses, the applicant must provide *substantial and reliable evidence* showing "sufficient net liquid assets on hand, *or committed sources of funds* to construct and operate for three months without revenue . . . ."

* * *

> Probative evidence necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds. For example, uncontroverted affidavits or testimony establishing an oral contract to lend money would suffice to demonstrate a committed source of funds. *Where the lender is not a financial institution but a person, as in this case, the applicant must show that the person proposing to lend the funds had the necessary financial resources at that time.* In such a case, we believe that a balance sheet or other documentary evidence (such as a financial statement) demonstrating that, at the time of certification, that person had sufficient net liquid assets to meet his financial commitment to the applicant would be clear evidence to support the certification. *See Armando Garcia*, 3 FCC Rcd 1065, 1066 ¶ 11 (Rev. Bd.), *review denied*, 3 FCC Rcd 4767 (1988) . . . .

Northampton Media Associates, 4 FCC Rcd 5517, 5518-19 (1989) (emphases added). *See also Shawn Phalen*, FCC 90R-27, released April 20, 1990, at para. 4.

7. Although Castro had seen no written documentation demonstrating Coles' ability to fund the loan, had no underwriting guarantee of funding from the investment banker (*compare Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7946 (Rev. Bd. 1989)), and had never personally met Stabler, she nevertheless relied on Stabler's verbal assurance (and subsequent letter) as support for her certification. Tr. 4045, 4051-52, 4091. Furthermore, the record contains no reliable and affirmative indication that Coles ever seriously intended to supply a "reasonable assurance" of financing to North Texas, as opposed to, at most, a mere "accommodation" to Stabler, who also apparently was her tax accountant (SFS, Att. I at 2). *See Shawn Phalen*, 5 FCC Rcd 53 (Rev. Bd. 1990), *clarified*, FCC 90R-27, released April 20, 1990; *JAM Communications, Inc.*, 4 FCC Rcd 3754 (Rev. Bd. 1989). All the "known" details of Coles' involvement are provided in Stabler's unexecuted affidavit (SFS, ATT. I), and no testimony or affidavits from Coles appear in the record. Moreover, it is undisputed that Coles is not now willing to fund North Texas.

8. Further, we note that comments challenge the adequacy of North Texas' cost estimates. These questions may be explored under the financial issue we are adding. Finally, if the documents or proposed exhibits exchanged

prior to the supplemental hearing or the supplemental hearing testimony so warrant, the Presiding Officer should, on his own motion, further enlarge the issues to include false certification/misrepresentation issues, as appropriate. *JAM Communications, Inc., supra*, 4 FCC Rcd at 3758 n. 6.

9. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed August 1, September 28, 1989, January 18, and April 2, 1990 by Sammy A. Thornton, Native American Broadcasting Company, A Limited Partnership, Metroplex Communications, Inc., and Channel 68, North Texas Television Limited Partnership, respectively, the "Statement for the Record" filed August 2, 1989 by Southwest Communications, Ltd. and the related motion to strike filed August 9, 1989 by United Broadcast Group, Ltd., and the petition to enlarge issues filed July 5, 1989 by Channel 68, North Texas Television Limited Partnership, and the related pleadings ARE REFERRED to the Presiding Officer; and

10. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to the Presiding Officer for the adduction of additional evidence and preparation of a Supplemental Initial Decision on the following issue:

> To determine whether Channel 68, North Texas Television Limited Partnership is financially qualified to be a Commission licensee.

11. IT IS FURTHER ORDERED, That the burdens of proceeding and proof on the issue SHALL BE on Channel 68, North Texas Television Limited Partnership.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-86

In re Applications of

GREAT LAKES BROADCASTING, INC.	File No. BPH-870327KA
HURON COMMUNICATIONS COMPANY LIMITED PARTNERSHIP	File No. BPH-8703310B
THOMAS W. ROBERTS	File No. BPH-870331PF
NCB ENTERPRISES, INC.	File No. BPH-870410KC
FIRELANDS BROADCASTING CORP.	File No. BPH-870415MO

For Construction Permit for a
New FM Station on Channel 241A
Huron, Ohio

APPEARANCES

1. *James L. Oyster* on behalf of Great Lakes Broadcasting, Inc., *Edward Hayes, Jr.* and *Linda Bocchi* on behalf of Huron Communications Company Limited Partnership, *Thomas L. Siebert* and *Stephen Diaz Gavin* on behalf of Thomas W. Roberts, *Alfred C. Cordon* and *Dennis J. Kelly* on behalf of NCB Enterprises, Inc. and *Howard M. Liberman* and *Gerald Stevens - Kittner* on behalf of Firelands Broadcasting Corp.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: April 27, 1990; Released: May 9, 1990

2. This proceeding involves the mutually exclusive applications of Great Lakes Broadcasting, Inc. (Great Lakes), Huron Communications Company Limited Partnership (Huron), Thomas W. Roberts (Roberts), NCB Enterprises, Inc. (NCB), and Firelands Broadcasting Corp. (Firelands)[1] for a new FM station on channel 241A in Huron, Ohio.

3. The applications were designated for hearing by the Chief of the Mass Media Bureau in the *Hearing Designation Order*, MM Docket No. 88-86, released in this proceeding on March 14, 1988. The aforementioned *Order* specified the following issues for hearing:

(1) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(2) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

The Commission, after noting that the data submitted by the applicants indicates that there would be significant differences in the size of the areas and populations to be served by the various proposals, ordered the parties to submit evidence under the standard comparative issue of the areas and populations that would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas for the purpose of determining whether a comparative preference should accrue to any one of the applicants.

4. A pre-hearing conference was held on May 18, 1988, and hearing sessions were conducted on October 25, 26, and 31, 1988. The record was closed on October 31, 1988, and the parties were directed to file Proposed Findings of Fact and Conclusions of Law, and Replies thereto.

GREAT LAKES BROADCASTING, INC.

Findings of Fact

5. Great Lakes is a Ohio corporation. Ernest G. McClellan is the President, Director and sole stockholder (Great Lakes, Ex. 1).

Best Practicable Service

Ernest G. McClellan

6. Mr. McClellan will serve on a full-time basis, not less than forty (40) hours a week, as the proposed station's General Manager. In that role, he will be responsible for the day-to-day operations of the station, and he will supervise all aspects of the station's operations, including its programming (Great Lakes, Ex. 1).

7. Mr. McClellan is a resident of Castalia, Ohio, which is located within the primary service contour (1 mV/m) of Great Lakes' proposed station. He has lived there for more than 17 years. In the event that Great Lakes receives the permit for the Huron facility, Mr. McClellan will move to the city of license (Great Lakes, Ex. 1).

8. Mr. McClellan served until 1986, for a period of 10 years, as Deacon at the Wayside Temple, a church in Castalia, Ohio. While serving in that capacity, he was involved in organizing various activities for the youth of that community. He also helped produce a show for airing on radio and television stations for the local Social Security office which was directed primarily to elderly of Castalia, Ohio. These activities occurred while Mr. McClellan served both as Deacon at the Wayside Temple and while an employee of WGGN in Castalia, Ohio (Great Lakes, Ex. 1). He resigned as Deacon and from WGGN in 1986, and his civic activities in Castalia, Ohio ceased contemporaneously with these resignations.

9. Mr. McClellan's broadcast experience began in 1975 at station WGGN and continued until June 1986. He served, during that period of time, as Air Announcer, Sales Manager, Vice President, and finally as General Manager (Great Lakes, Ex. 1).

Auxiliary Power

10. Great Lakes will install and maintain auxiliary power generating equipment at its transmitter/tower and main studio locations in order to provide emergency power to its transmitter and all studio facilities during periods of electrical power outage (Great Lakes, Ex. 2).

Diversification

11. Neither Great Lakes nor Mr. McClellan have any other media interests (Great Lakes, Ex. 1).

Conclusions of Law

12. Great Lakes is entitled to a 100 percent quantitative integration credit on the basis of its proposal to integrate its sole shareholder, Ernest G. McClellan, into the management of its proposed station. This quantitative integration credit is qualitatively enhanced to a moderate degree by Mr. McClellan's residence for in excess of 17 years within the 1 mV/m contour of Great Lakes' proposed station. (*See Waters B / Cing Corporation* 91 F.C.C. 2d 1260, 1263 (1982)). His proposal to actually move to Huron, Ohio, in the event that Great Lakes application is granted, entitles its integration credit to a further, slight qualitative enhancement. (*See Klein, Alexander S., Jr.* 69 F.C.C. 2d 2134, 2143; and *Armando Garcia* 3 F.C.C. Rcd. 1065, 1068)). The civic activities for which he seek further credit were performed in conjunction with his employment at WGGN where he was employed between 1975 and 1986 or with his duties as a Deacon at the Wayside Temple for which he received compensation. Christian Faith Broadcasting is the licensee of station WGGN Radio and Television (Tr. 78). Wayside Temple, in turn, is the 100 percent shareholder of Christian Faith Broadcasting (Tr. 24).

13. The nexus between Mr. McClellan's position as Deacon at the Wayside Temple, and his employment with Christian Faith Broadcasting is clear. As noted above, the Wayside Temple is the 100 percent shareholder of Christian Faith Broadcasting. Approximately 5 or 6 other employees of Christian Faith Broadcasting were also associated with the Wayside Temple (Tr. 80). Similarly, his duties associated with both appear to have been to a great extent responsible for his civic activities within the Castalia, Ohio community. While employed at Christian Faith Broadcasting, Mr. McClellan was the person in charge of ascertaining the public needs and interests of its service area for the station, and he was in contact with civic groups such as the Kiwanis Club in helping to address those needs (Great Lakes, Ex. 1, Attachment A). For example, the program produced in conjunction with the Social Security Administration, for which Great Lakes claims credit, was aired over WGGN's radio and television stations (Tr. 80). His activities with the youth of Great Lakes' proposed service area were associated with his duties as Deacon at the Wayside Temple (Tr. 78-81). The most telling evidence of a connection between these activities and McClellan's positions at the Wayside Temple and at station WGGN is the fact these activities ceased when he severed his relationships with both organizations (Tr. 81). Accordingly, the enhancement for Mr. McClellan's civic activities is found to be slight in view of the fact that these activities were clearly employment related and were performed as a direct by product of his employment with Christian Faith Broadcasting, the licensee of WGGN's stations, and his position as Deacon at the Wayside Temple, the 100 percent shareholder of Christian Faith Broadcasting, the licensee of stations WGGN, Castalia, Ohio. These activities are, therefore, found to be of less significance in weighing the merits of the Great Lakes' proposal. (*See Jarad B / Casting Co. Inc.* 61 R.R. 2d 389, 404, 407 (1986)). Finally, Great Lakes quantitative integration credit is entitled to a further, slight enhancement because of Mr. McClellan's past broadcast experience.

14. Great Lakes is subject to no diversification demerit.

HURON COMMUNICATIONS COMPANY LIMITED PARTNERSHIP

Findings of Fact

15. Huron is an Ohio Limited Partnership comprised of one general partner, Benjamin F. Davis, Jr. and one limited partner, Dominic L. Ozanne. Mr. Davis holds 100 percent of the voting power and 70 percent of equity and Mr. Ozanne, the remaining 30 percent (Huron, Ex. #1, p. 2).

Best Practicable Service

Benjamin F. Davis, Jr.

16. Mr. Davis, a Black American, will serve as General Manager of the station and will work a minimum of 40 hours a week in that capacity. As General Manager, Mr. Davis will oversee the construction and operation of the station, hire department heads and oversee the hiring of other key station personnel (Huron, Ex. #2, p. 2). Mr. Davis will move to Huron, Ohio in the event that Huron's application is granted (Huron, Ex. #2, p. 3).

17. From 1984 to 1988, Mr. Davis was Chief Executive Officer and Chairman of the Board of Telecable Broadcasting of Jefferson Township, Inc. (Huron, Ex. #2, p. 3). In that position, he had primary responsibility for the organization, incorporation and start-up operations of that cable system which served 1,000 subscribers in Jefferson Township, Ohio, and he also had responsibility for the system's day-to-day operations with particular emphasis on its financial activity and governmental relations (Huron, Ex. #2, p. 3). Prior to 1984, he was President and Chief Financial Officer for a cable system serving East Cleveland, Ohio (Huron, Ex. #2, p. 3-4). Mr. Davis was responsible for the incorporation of the company, securing financing for the cable system's operations, and he was in charge of the system's day-to-day operations with special emphasis on its financial responsibility (Huron, Ex. #2, p. 4).

Auxiliary Power

18. Huron will install emergency power generating equipment at its main studio and transmitter locations in order to permit uninterrupted service to its station's service area during power outages (Huron, Ex. #3, p. 2).

Diversification

19. As of June 22, 1987, the last date for filing amendments as a matter of right, Mr. Davis owned a fifty (50) percent interest in Telecable Broadcasting of Jefferson Township, Inc., which operated a cable television system in Jefferson Township, Ohio approximately 142 miles from Huron, Ohio. The cable television system served

approximately 1,000 subscribers (Huron, Ex. #2, p. 3). In January 1988, the assets of that cable system were sold, and it no longer operates as a medium of mass communications (Huron, Ex. #2, p. 3). Mr. Davis is, presently, the sole stockholder, officer, and director of Integrated Broadcasting, Inc. (IBC). Effective December 1, 1989, IBC became the licensee of station KOKL (FM), Okmulgee, Oklahoma. (*See Orders* FCC 90M-47 and FCC 90M-138, released in this proceeding on January 8, 1990 and January 23, 1990, respectively).

Conclusions of Law

20. As of the so-called "B" cut-off date for this proceeding, Huron had filed a Certificate of Limited Partnership which contained only the most basic information about the partnership and nothing with respect to the rights, responsibilities and liabilities of the general and limited partners. In addition, it lacked any explanation of the scope of the authority of the general partner to manage the affairs of the partnership or any restrictions on the limited partner's ability to become involved in the day-to-day management of the partnership business. In short, as of the B cut-off date, Huron had no written contractual agreement setting forth the nature of the relationship between the two partners. However, on May 26, 1988, prior to the date for filing integration proposals in this proceeding, Huron's partners executed a binding limited partnership agreement which establishes their individual rights and liabilities. The Presiding Judge concludes, therefore, that Huron's proposal to integrate its sole general partner and to insulate its limited partner is supported by a legally binding agree agreement which entitles its integration proposal to comparative credit.

21. Mr. Davis was solely responsible for drafting the certificate of limited partnership (Tr. 102), which he prepared from a sample limited partnership agreement which he had in his possession (Tr. 103, 126). Mr. Ozanne, the limited partner, although he is an attorney, did not give Mr. Davis any guidance as to what provisions had to be included in such a certificate executed in the State of Ohio (Tr. 102, 511). The partnership agreement was typed and signed in Mr. Ozanne's office (Tr. 102, 511) because Mr. Davis does not have an office in Cleveland, Ohio (Tr. 173), and Mr. Ozanne's Cleveland office is located in close proximity to the County Recorder's Office (Tr. 115). Mr. Ozanne also agreed to deliver the document for recordation in the County Recorder's Office in Cleveland, Ohio (Tr. 104, 171), as well as to file a name registration transmission (Tr. 173) which he filed a second time after the first document was returned because of a wrong address (Tr. 174). Mr. Ozanne's activities on behalf of the partnership appear to have been purely administrative. There has been no showing that he performed any legal services for Mr. Davis (Tr. 506). The record further demonstrates that all of the important decisions with respect to Huron's proposal were made by Mr. Davis. For example, Mr. Davis chose both legal and engineering counsel. All documents and invoices were sent only to Mr. Davis (Tr. 105, 115). Mr. Davis filled out Huron's application (Tr. 138), and he personally filed an amendment to the certificate of limited partnership with the county (Tr. 114-115). According to Mr. Davis, Mr. Ozanne's only significant participation in the overall process was providing answers to certain written interrogatories (Tr. 106-107).

22. The Presiding Judge finds that the evidence of record indicates that Mr. Davis, Huron's sole general partner, has been and remains in exclusive control of the entity, and that his proposal to work 40 hours a week at the station entitles Huron to a 100 percent quantitative integration credit. There is no evidence of record which demonstrates that Mr. Davis, who, it is noted, owns a majority interest in Huron's equity, is not in charge, will not remain in charge, or that Mr. Ozanne is not properly insulated from participating in the business of the partnership.

23. Mr. Davis is a Black American which entitles Huron's quantitative integration credit of 100 percent to a substantial qualitative enhancement. This credit is further enhanced, to a slight degree, by Mr. Davis' commitment to move to Huron in the event that its application is granted. Mr. Davis has had some work experience with a cable system which entitles Huron's 100 percent quantitative integration credit to a further slight enhancement.

24. As of the "B" cut-off date, Mr. Davis had a 50 percent ownership interest in and served as President and Chief Executive Officer for a cable system in Dayton, Ohio located approximately 142 miles from Huron, Ohio. The system served 1,000 subscribers. The Presiding Judge concludes that Mr. Davis' interest in a cable system located at a substantial distance from Huron, Ohio is of only slight decisional significance. (*See Greater Wichita Telecasting, Inc.* 96 F.C.C. 2d 984, 988 (1984), *Religious Broadcasting Network* 3 F.C.C. Rcd. 4085, 4104 - n. 4). Similarly, his ownership of the FM station in Oklahoma, at a considerable distance from Huron, Ohio is also of little comparative significance.

THOMAS W. ROBERTS

Findings of Fact

25. Thomas W. Roberts has filed his application for the facility in Huron, Ohio as an individual applicant (Roberts, Ex. 1).

Thomas W. Roberts

26. Mr. Roberts will devote a minimum of 40 hours a week to his duties as General Manager of Roberts' proposed Huron station (Roberts, Ex. 3). As General Manager, he will have primary and ultimate responsibility for all decisions affecting the station's day-to-day and long-range operations (Roberts, Ex. 3).

27. Mr. Roberts has lived within the 1 mV/m service area of the proposed station for virtually his entire life. He presently resides in Vermilion, Ohio which also falls within that service area (Roberts, Ex. #4, p. 1). From 1976 to the present, Mr. Roberts has been a member of the Vermilion Chamber of Commerce, serving two terms on its Board of Directors and one term as a Vice President. He is also a former Member of the Chambers of Commerce of Huron, Ohio, Sandusky, Ohio, Lorain, Ohio and Elyria, Ohio. In 1982, Mr. Roberts was a Member of the Firelands Tourism Commission, and between 1982 and 1983, he was an advisor to the Kelly's Island Landowners Association. In 1986, Mr. Roberts formed the Step Up Committee for Economic Development throughout the area (Roberts, Ex. #4, p. 5). He also served as an advisor to various commercial associations, and he was

involved in a number of community organizations between 1976 and 1983. Mr. Roberts co-founded and served as Chairman of the Vermilion Winter Festival, 1977-79; Coordinator for Keep America Beautiful/Clean City Campaign for Erie and Lorain Counties, 1978; Coordinator for Lorain County Arts Council Fund Raising, 1976-78; committee work on Easter Seals Drive (1977) and Friends of the Boeckling Drive (1981-83); Operation Christmas Joy/Kiwanis, 1976-77; Fire Department CPR Safety Campaign, 1977 (Roberts, Ex. #4, p. 6). Mr. Roberts has also chaired and participated in the organization of the following activities: American Cancer Society Auction (1978-79); UNICEF "Year of the Child" Fundraiser, 1978; Ecology and Earth Day Awareness Programs, 1977; Strong Circus for Kids/Kiwanis Benefit for Kids Project, 1977-78; Kiwanis Celebrity Golf Tournament (1976); Boater's Weather Advisory Service (1982-83); Hi-Miler 500, Sandusky (1982-83) (Roberts, Ex. #4, p. 6). In addition, Mr. Roberts worked on five School Levy ballot initiatives for the Vermilion School District between 1986 and 1988, and he helped conceive, name and organize "A-Plus", a committee for multi-community educational citizen assistance in the area. Between 1977 and 1978, Mr. Roberts participated in efforts for levies for parks, ecology and social services in the area (Roberts, Ex. #4, p. 6), and from 1977 to 1980, he participated in various United Way activities. He was also a member of the America Cancer Society from 1977 to 1980, and served for one year on the Board of Directors of the Lorain County Chapter. Mr. Roberts is a member of the congregation of the United Church of Christ, Vermilion, Ohio (Roberts, Ex. #4, pp. 6-7).

28. Mr. Roberts joined WZLE (FM), Lorain, Ohio in September 1975, as an advertising sales representative, and he ultimately became Promotions Director and a Senior Account Executive. He remained there for five and one-half years, after which time he left to accept a management position at WLEC (AM) WCPZ (FM) Sandusky, Ohio (Roberts, Ex. 4, p. 3).

29. Mr. Roberts is presently involved in the filing of applications with this Commission for Rural Service Area (RSA) cellular telephone authorizations (Tr. 292). He is the sole general partner of North Coast Cellular Associates Limited Partnership II (North Coast), the applicant for these facilities (Tr. 292-93, 306). Mr. Roberts presently devotes 20 hours a week to the project (Tr. 293), and he is obligated to contribute 428 RSA applications to the partnership (Firelands, Ex. #4, p. 4). The filing of these applications for the partnership will be completed by January, 1989. His duties for the partnership include the following:

(a) Obtain and maintain insurance for the partnership.

(b) Deposit partnership funds in appropriate accounts.

(c) Maintain complete and accurate records of partnership assets.

(d) Prepare and distribute all tax reporting information for the partners; and

(e) Perform such acts as may be required to maintain the partner-ship as a limited partner.

(Firelands, Ex. #4, p. 12). The partnership agreement does not specifically obligate Mr. Roberts to assume any responsibilities as general partner in the event of the grant of one or more RSA applications (Tr. 312). However, Mr. Roberts estimates that his duties as general partner would require, at the very most, 5 or 10 hours a month after completion of all the RSA filings (Tr. 313).

Auxiliary Power

30. Mr. Roberts will provide an auxiliary power supply to both his transmitter and studio locations so that his proposed FM station can continue to operate in the event of a failure of the regular power source in the Huron, Ohio area (Roberts, Ex. #5).

Diversification

31. Mr. Roberts has no other applications, licenses, or ownership interests in radio, television or any other medium of mass communications (Robert, Ex. #2).

Conclusions of Law

32. Mr. Roberts is the sole general partner in North Coast which has filed over 400 RSA applications with the Commission (Firelands, Ex. #4, p. 4; Tr. 292, 293 and 306). It anticipates filing a total of 428 applications (Firelands, Ex. #4, p. 4). The evidence of record indicates that Mr. Roberts presently devotes 20 hours a week to this venture which requires travel within Northern Ohio and also to Washington, D.C. (Tr. 292-93). In the event that any one of these cellular applications is granted, Mr. Roberts will have the responsibility of managing the investments (Tr. 305), and the Partnership Agreement provides that the general partner will be required to devote as much of his time to the business of the partnership as is necessary for him to fulfill his duties as general partner of the Partnership (Firelands, Ex. #4, p. 12). Mr. Roberts also spends a few hours a week managing a rental property (Tr. 291). At present, Mr. Roberts works more than 60 hours a week for his own business, Mercury Marketing (Tr. 286) and on the cellular telephone activities of North Coast, a figure which includes a few hours a month spent managing the rental property he and his wife own.

33. Mr. Roberts testified that after he completes the final filing of the RSA cellular applications in early January, 1989, his responsibilities for North Coast will be greatly reduced, and that he would be surprised if he had to spend more than 5 or 10 hours a month in the aggregate on these duties (Tr. 313). The partnership agreement itself does not obligate Mr. Roberts to devote any specific amount of time as general partner. Mr. Roberts testified that as general partner he can delegate any continuing responsibilities to competent professionals (Tr. 312). He described his duties for North Coast as similar to those held by people who deal with investments or similar activities (Tr. 312-313). Mr. Roberts has stated clearly his intention to terminate his self-employment if granted the construction permit. Therefore, at the very most, Mr. Roberts anticipates working no more than 45 to 46 hours a week, a figure which includes his 40 hour a week commitment to the proposed station and a figure which falls well within the 50 to 60 hour work week which the Commission has found to be realistic. The Presiding Judge concludes, therefore, that Mr. Roberts is entitled to a 100 percent quantitative integration credit.

34. Roberts' quantitative integration credit is qualitatively enhanced by Mr. Roberts residence within the 1 mV/m contour of the proposed station. The civic activities in which Mr. Roberts participated and which occurred within the station's projected 1 mV/m contour were primarily undertaken in connection with his employment at stations WZLE and WLEC/WCPZ as part of those stations' promotional efforts. In addition, none of these activities were specific to Huron. Activities which occur outside the proposed community of license but within the stations proposed service area or were related to a person's employment are given less credit. (*See Walters B / casting Corporation*, 91 F.C.C. 2d 1260, 1263 n. 10 (1982)). Mr. Roberts' civic activities entitled his integration credit to only a slight further enhancement. Mr. Roberts prior broadcast experience entitles this credit to a further slight enhancement.

35. Mr. Roberts receives no diversification demerit since he has no interests or associations with any medium of mass communications.

NCB ENTERPRISES, INC.

Findings of Fact

36. NCB is a Ohio corporation. It is authorized to issue 1,000 shares of only one class of stock, voting common stock, each share bearing one vote. NCB has 1,000 shares of the common stock issued and outstanding. All of which are fully-paid for and non-assessable (NCB, Ex. #1). The officers, directors and stockholders of NCB are as follows: Harold E. Sens, President, Director, and 65 percent shareholder, Dean S. Lucal, Secretary/Treasurer, Director, and 10 percent shareholder, and Robert Barnes, Vice President, Director, and 25 percent shareholder.

Best Practicable Service

Harold E. Sens

37. Mr. Sens is the only NCB shareholder who proposes to be integrated into the affairs of the station. In the event that NCB's application is granted, Mr. Sens would serve full-time, a minimum of 40 hours a week, as the General Manager of NCB's proposed FM station. As General Manager, Mr. Sens will have full and complete charge over all aspects of the operation of the station, including business affairs, programming, public relations, promotions, sales and technical matters. He will also make all hiring and firing decisions as well as all management decisions. All of the station's employees will report directly to Mr. Sens (NCB, Ex. #2, p. 1).

38. Mr. Sens has lived in Sandusky, Ohio since 1954. His residence is located within NCB's proposed 1 mV/m (60 dBu) contour (NCB, Ex. #2, p. 2). Mr. Sens has been a member and has participated in activities within the proposed service area for the following organizations: past Member of the Knights of Columbus (1955); past Member of the Junior Chamber of Commerce Board of Directors (1957-63); one of the originating members of the Lake Erie Tourist Council; Past Member of the YMCA Board of Directors 1972; past Member of the Kiwanis Club Board of Directors (1971); Member, Board of Directors, Erie County Cancer Society (1973); past Member of the Rotary Club (1982); and Erie County Chairman, March of Dimes (1957) (NCB, Ex. #2, p. 2).

39. Mr. Sens' broadcast experience began in 1960 when he was hired as a salesman for WLEL (AM), Sandusky, Ohio. He subsequently became Assistant Sales Manager, Sales Manager, and then in 1971 Vice President and General Manager. From July, 1975 until June, 1983, Mr. Sens was President and General Manager of station WZLE (FM), Lorain, Ohio (NCB, Ex. 2, p. 2-3).

Auxiliary Power

40. NCB will install auxiliary power generation equipment at both its studio and transmitter locations (NCB, Ex. #3).

Diversification

41. Mr. Sens has no interest in and/or association with any medium of mass communications.

Conclusions of Law

42. Mr. Sens has lived within the 1 mV/m contour of NCB's proposed station since 1954 (NCB, Ex. #2, p. 2). He has never actually lived within the city limits of Huron, Ohio. He has participated in civic activities within the 1 mV/m contour of the proposed station and for the most part, these activities occurred 15 to 20 years ago. With the exception of his membership in the Rotary Club in 1982, his most recent civic activity is as a Member and Director of the Erie County Cancer Society in 1973. The rest of his activities took place before 1973. The Commission has held that civic activities which occurred in the distant past are meaningless in terms of appreciation gained for the needs and interests of the community. (*See Linda Crook* 3 FCC Rcd. 354). Therefore, NCB's quantitative integration credit of 65 percent will receive only a moderate enhancement for Mr. Sens residence within the 1 mV/m contour of the proposed station, and an additional, very slight further enhancement because of his participation in civic activities within that area. Mr. Sens also has extensive broadcast experience which entitles NCB's quantitative integration credit to a further slight enhancement.

43. NCB's application is not subject to any diversification demerit.

FIRELANDS BROADCASTING CORP.

Findings of Fact

44. Firelands is a corporation organized under the laws of the State of Delaware (Firelands, Ex. #1). The corporation has authority to issue two classes of common stock, with Class A common stock having all the voting rights and Class B common stock having no voting rights. Shelly Luipold owns all of the issued and outstanding shares of Firelands' Class A common stock, and she serves as the corporation's sole Director as well as its President, Secretary and Treasurer. Ms. Luipold's stock represents a one third interest in the corporation's total equity. The corporation's Class B common stock is owned by Jay Wagner, George Mayer and John S. Stipp. Mr. Wagner owns 500 shares, representing a one-third interest in the corporation's total equity, and the Messrs. Mayer and Stipp each own 250 shares of Class B common stock, representing 16.66 percent of the corporation's total equity (Firelands, Ex. #1).

Best Practicable Service

Shelly Luipold

45. Ms. Luipold intends to work full-time, at least 40 hours a week, as General Manager of the proposed station (Firelands, Ex. #2, p. 1).

46. Ms. Luipold has lived within Firelands' predicted 1 mV/m contour for the past 43 years (Firelands, Ex. #2, p. 1). During this period of time, she has been involved in a number of civic activities in the greater Sandusky, Ohio area which falls within Firelands' predicted 1 mV/m contour (Firelands, Ex. #2, p. 2). These activities include membership in a group whose purpose is to promote boating safety in the Sandusky area; serving as Secretary of a Cub Scout pack in Sandusky; serving as a volunteer member of the Sandusky Public School Cluster Committee, whose role was to study and recommend a plan for racially integrating the Sandusky, Ohio school system; serving as Chairman in 1987 for the Parents/Student Orientation and Public Relations Committee of the Sandusky Public Schools; serving as a Judge at the Erie County Fair; serving from 1982 to 1985 as a Member of the Friends of the Boeckling, a group whose purpose is to restore an historic paddle boat; serving as a volunteer for a hospice located in Sandusky; and as a Member and Sunday School Teacher in local churches (Firelands, Ex. #2, pp. 2-3).

47. Ms. Luipold has worked at radio stations in various capacities since 1965. She served as a writer and producer of commercials as well as an on-the-air personality with station WLEC (AM), Sandusky, Ohio, from 1965 to 1987. She is now writing and producing commercials for station WOSE (FM), Port Clinton, Ohio (Firelands, Ex. #2, p. 4). She also serves as a bookkeeper for her husband's plumbing and heating business (Firelands, Ex. #2, p. 4). In the event that the Firelands' application is granted, Mrs. Luipold will terminate all conflicting time commitments in order to devote herself full-time to her duties as General Manager at the Firelands station, and she will continue to serve as bookkeeper for her husband's plumbing and heating business if time permits (Firelands, Ex. #2, p. 4).

Auxiliary Power

48. Firelands plans on installing auxiliary power generating equipment at its main studio and transmitter locations (Firelands, Ex. #3).

Diversification

49. Neither Firelands nor any of its shareholders holds any ownership interest or cognizable management position in any medium of mass communications (Firelands, Ex. #1).

50. An amendment filed on November 23, 1988, reflects that George Mayer, operating as an independent contractor, serves as an on-air host on a weekly radio program which is aired on station WLEC (AM), Sandusky, Ohio; and that Jay Wagner is a consultant to Erie County Cablevision Inc., which operates a cable system serving Sandusky, Ohio and several surrounding communities. Mr. Wagner's duties consist of answering one or two questions from the cable company's current management and assisting the company in their annual United Way Campaign. Mr. Wagner devotes approximately three hours a year to these duties. However, he does not attend board meetings or meetings of officers, sign any documents, maintain an office or represent the cable system at any meetings or other gatherings.

Conclusions of Law

51. Ms. Luipold has resided within the 1 mV/m contour of Firelands' proposed station for in excess of 40 years, and she has been involved in civic activities within the greater Sandusky, Ohio area which also falls within the station's projected service contour. Any integration credit awarded Ms. Luipold is, therefore, entitled to a moderate qualitative enhancement for her residence within the 1 mV/m contour of the proposed station with civic involvement and to a further moderate enhancement for her gender.

52. The evidence of record viewed as a whole demonstrates that Ms. Luipold has been the moving force behind this application (Tr. 341). She initiated the idea of applying for the station (Tr. 341), and she contacted both Mr. Wagner and Mr. Mayer and arranged for their participation (Tr. 343, 455, 457). Ms. Luipold prepared Firelands' budget for construction and initial operating costs (Tr. 366) and retained and kept in touch with both communications law and engineering counsel (Tr. 365, 366, 353-55). The record also reveals that she prepared Firelands' application, independently of any other principal but with the assistance of counsel (Tr. 351-56, 421), and located and secured Firelands' current transmitter site (Tr. 370).

53. Ms. Luipold is a former employee of the non-voting shareholder, Jay Wagner. She began working for him in 1965 when Mr. Wagner was General Manager at station WLEC in Sandusky, Ohio, and Ms. Luipold was hired to write commercials for the radio station. Ms. Luipold worked for Mr. Wagner for more than two decades (Tr. 338-339). She indicated that she sought the involvement of Mr. Wagner and the other non-voting shareholder Mr. Mayer, whom she also knew (Tr. 344), because of their knowledge of the broadcasting industry (Tr. 346); and that she relied on Mr. Wagner to retain communications counsel for the applicant and to locate a transmitter site because of his extensive experience in broadcasting (Tr. 348). Mr. Wagner alone communicated with the landowner of Firelands' original transmitter site, and he believes that he spoke to Mr. Bell, Firelands' engineer (Tr. 350, 492, 495).

54. Mr. Mayer suggested to Ms. Luipold that they get in touch with the First National Bank for financing the project, and at her request (Tr. 401) Mr. Mayer made the call to inquire whether or not the bank would be willing to loan Firelands the money to build the station and operate the facility for three months without revenues (Tr. 366). Ms. Luipold did not approach the bank (Tr. 396), but relied instead on Mr. Mayer who, in addition to being a broadcaster, was an experienced banker, having been employed as an officer of the Erie County Bank in Vermilion, Ohio, now a part of Society National Bank of Ohio (Tr. 345). After Mr. Mayer's initial contact, Ms. Luipold corresponded by mail with an official of Firelands' lending institution (Tr. 367).

55. Ms. Luipold has more than 20 years of broadcasting experience. She holds 30 percent of the equity in the corporation, and she is contributing her pro-rata share of the costs of prosecuting Firelands' application. In addition, she has been involved in each and every aspect of the application process. Although Messrs. Wagner and

Mayer performed certain tasks at her direction such as securing communications counsel, the original transmitter site as well as the financing for the proposal. Ms. Luipold secured the present transmitter site, prepared the budget for the station, actually retained communications and engineering counsel (Tr. 365), and prepared the application. There is no evidence of record that Messrs. Wagner and Mayer performed any tasks for Firelands after those initial activities. In conclusion, it appears to the undersigned to be perfectly reasonable, in view of the backgrounds of Mr. Wagner and Mr. Mayer, that Ms. Luipold initially sought their assistance in moving the proposal forward. It does not follow, however, that she will continue to rely on these gentlemen, or that they will control or assist in any way in the management of the station in the event that Firelands is the successful applicant. Her actions on behalf of the enterprise, as set forth in the record, demonstrate that she is the control of the venture and capable of making decisions with respect to matters of significance without the assistance of either Mr. Wagner or Mr. Mayer.

56. Firelands filed its certificate of incorporation with the State of Delaware prior to filing its application. On September 8, 1987, it adopted By-Laws, obtained signed stock subscription agreements from its shareholders, and then on May 5, 1988 issued stock certificates (Firelands, Exs. #6 and 7). All of this was done prior to the date established for the exchange of integration proposals. In addition, Firelands has specifically excluded any holder of Class B common stock from any material involvement in the day-to-day operations of the station (Firelands, Ex. #5), and Ms. Luipold is the sole Director of the corporation.

57. The Presiding Judge concludes, therefore, that there is no evidence of record which demonstrates that any non-voting shareholder will have any material involvement whatsoever in the day-to-day operations of the station or be in a position to influence or exercise control over the operations of the station. The Messrs. Wagner and Mayer are found, therefore, to be merely passive investors in Firelands. This applicant is entitled, therefore, to a 100 percent quantitative integration credit for its proposal to integrate its sole voting shareholder into the affairs of the station; a credit that is qualitatively enhanced to a moderate degree both by Ms. Luipold's gender and by her long-term residence within the proposed contour of the station with some civic involvement. Firelands' integration credit is further enhanced to a slight degree by Ms. Luipold's past broadcast experience.

58. Firelands and its voting shareholder, Ms. Luipold have no interest or association with any medium of mass communications. Messrs. Mayer and Wagner's media associations are of no decisional significance since they are both non-voting shareholders.

Comparative Coverage

59. The parties hereto have stipulated based on their evaluation of the areas and populations which would receive a broadcast service of 1 mV/m or greater intensity pursuant to their proposals, together with the availability of other primary aural services with the various service areas, that no comparative preference should accrue to any one of the applicants as a result of any differences in the size of the areas and populations to be served (Tr. 77; Joint Ex. #1, p. 1).

Auxiliary Power

60. Each applicant proposes auxiliary power at both their proposed studio and transmitter site (Great Lakes, Ex. #2; Huron, Ex. #3; Roberts, Ex. #5; NCB, Ex. #3; and Firelands, Ex. #3). No applicant is, therefore, entitled to an auxiliary power preference.

ULTIMATE CONCLUSIONS

61. Of the five proposals under consideration here, four have been found to be entitled to a 100 percent quantitative integration credit. The sole exception is NCB which is entitled to only a 65 percent integration credit which factor removes it from further consideration as shall become apparent below. Of the five applicants, only Huron suffers a slight diversification demerit. None of the applicants is entitled to a city of license residence credit, although Great Lakes, Roberts, NCB and Firelands' integrated principals have resided for long periods of time within the proposed 1 mV/m contour of their respective stations with some civic involvement although not within Huron, Ohio itself. Huron is entitled to a minority preference and Firelands a gender preference. All of the integrated principals have broadcast experience, but only Huron and Great Lakes' integrated principals intend to move to Huron.

62. The Presiding Judge finds that between Roberts and Great Lakes, the latter is entitled to a moderate preference over Roberts whose principal does not intend to move to Huron, even though Mr. Roberts involvement in the civic affairs of his community was more extensive than Mr. McClellan's. Firelands' integrated principal does not intend to move to Huron, Ohio, but she is a female. The Presiding Judge further finds that this gender preference outweighs the preference awarded Great Lakes for the decision of its integrated principal to move to the city of license. Otherwise, these two applicants are from a comparative point of view on an equal footing. Huron is entitled to a substantial preference because of the minority status of its sole integrated principal, but it is subject to a slight diversification demerit. Although Huron's substantial minority preference places its proposal above that of NCB, Roberts and Great Lakes, Firelands gender preference and long-term residence within the 1 mV/m contour with some civic involvement equals Huron's minority preference with a commitment to move to Huron, Ohio. Both applicants would stand, therefore, on an equal footing except for the fact that Huron's application is subject to a slight diversification demerit which tips the balance in favor of Firelands. The Presiding Judge concludes, therefore, that Firelands' proposal would best serve the public interest and it will be granted.

RULINGS

63. IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Firelands Broadcasting Corp. (File No. BPH-870415MO) for authority to construct a new FM station on channel 241A in Huron, Ohio IS GRANTED; and the applications of Great Lakes Broadcasting, Inc. (File No. BPH-870327KA), Huron Communications Company Limited

Partnership (File No. BPH-8703310B), Thomas W. Roberts (File No. BPH-870331PF), and NCB Enterprises, Inc. (File No. BPH-870410KC) ARE DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

FOOTNOTES

[1] The applications filed for the same permit by Susan B. Klaus (File No. BPH-870327MC), Huron Broadcasting Corporation (File No. BPH-870327MH), Beverly Lynn Eckardt, Beatrice Eckardt-Ball, et al., d/b/a Radio Voice of Huron (File No. BPH-870331OY), and Lakeshore Community Radio, a General Partnership of Twopegs Radio Partners and Primemedia Broadcasting, Inc. (File No. BPH-870331PG) were dismissed with prejudice. *See* the *Order* released in this proceeding on May 20, 1988 (FCC 88M-1518).

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-432

In re Applications of

WELCH COMMUNICATIONS, INC. File No. BPH-870827MY

SWAN CREEK COMMUNICATIONS File No. BPH-870827NJ

For Construction Permit for a
New FM Station on Channel 297A
Swanton, Ohio

APPEARANCES

J. Richard Carr, Arthur L. Smith, and *Audrey L. Allison* on behalf of Welch Communications, Inc.; *Christopher D. Imlay* on behalf of Swan Creek Communications, and *Y. Paulette Laden* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: April 27, 1990; Released: May 9, 1990

FINDINGS OF FACT

INTRODUCTION

1. Two mutually-exclusive applicants remain in the running for FM Channel 297A in Swanton, Ohio: Welch Communications, Inc. and Swan Creek Communications, Inc.

2. After the interlocutory cycle had run its course, and two faltering applications had been dismissed,[1] evidence was adduced on the only factual issue remaining, the standard comparative issue. So the issues that need to be decided are (53 F.R. 43035 published October 25, 1988):[2]

> "1. To determine which of the proposals would on a comparative basis best serve the public interest; and
>
> "2. To determine, in light of the evidence addressed pursuant to the foregoing issues, which of the applications should be granted, if any."

3. However, in addition to the usual standard comparative factors (diversification, and best practicable service criteria), the Chief, Audio Services Division has called for comparative coverage evidence. *See* 53 F.R. 43035 *supra.* at para. 10.

4. We held the prehearing conference on January 12, 1989, an evidentiary admission session on February 17, 1989, and hearing sessions on March 27, 1989, and September 20, 1989. We closed the record on September 20, 1989. The two applicants, and the Mass Media Bureau filed Proposed Findings of Fact and Conclusions of Law on November 17, 1989. [3] Welch and Swan Creek filed Reply Findings on November 27, 1989.

Issue 1 - The Standard Comparative Issue
Comparative Coverage

5. As previously noted (Finding 3 *supra.*) comparative coverage evidence was adduced. Welch proposes primary service coverage to 169,068 people over a 1,822 sq. Km. area.[4] Swan Creek will serve 254,476 people over 1,823 sq. Km.

6. Neither applicant would provide a first, second, third, or fourth service to anyone. However, both would bring a 5th daytime and nighttime service. Welch would bring a 5th daytime and nighttime primary service to 3,452 people over a 6 sq. Km. area. Swan Creek will bring a 5th primary daytime and nighttime service to 5,355 people over 9 sq. Km.

7. Based on Findings 5-6 *supra.*, Swan Creek is entitled to a slight comparative preference over Welch.

Welch Communications, Inc.

8. Welch Communications is attempting to prosecute its application as a Delaware Corporation, incorporated by Charles W. Welch,[5] who is its sole owner. They base their 100% quantitative integration claim on that premise. However, Welch's opponents[6] have demonstrated that this *belated* representation was not entitled to comparative credit,[7] and that Welch's ownership and financial structure is a sham. They have, in fact, demonstrated that Welch Communication's ownership structure was not firmed up at the time they filed their application on August 27, 1987.

9. Here's a chart that depicts Welch's ownership structure as of the relevant cut-off date in this case (Nunn Ex. 6):

CHART

Principal	Position	Equity Interest
W. Charles Welch	President, Secretary, Treasurer	1,500 shares (50%)
Community Development Center	———	1,500 shares (50%)

10. In its application (BPH-870827MY) Welch also represented that CDC would confer the exclusive and sole right to vote its 1,500 shares on one, Mr. Paul Jones. But, at the time the application was filed, Jones had no connection whatsoever with CDC (Nunn Ex. 7; Jn 105).

11. Welch has never elected any corporate officers; they have no by-laws; and no corporate minutes have been taken. No stock certificates have been issued, no stock subscription agreement has ever been signed. Neither Mr. Welch, CDC, or Paul Jones have ever paid any money to the corporation for their stock interest in Welch Commu-

nications. Charles Welch decided on his own that he would be president, secretary, and treasurer of the corporation since he "was going to be the sole owner of this corporation" (Tr. 164, 169-171).

12. Mr. Welch first spoke to a Mr. Robert Webb, CDC's Executive Director, about CDC becoming involved in the Swanton application (Tr. 104-105). At that time Webb was the only person at CDC that Welch spoke to about joining in the Swanton application (Tr. 109).

13. The CDC Board of Directors then passed a resolution that specifically authorized Mr. Webb to act on CDC's behalf and spend monies from a reserve account to be used "in the purchase of the FM radio station." It isn't clear whether CDC's principals understood the nature of their participation in Welch Communications, Inc. (Nunn Ex. 8, 9).

14. CDC's Board of Directors includes Chairman Mr. Elmer Thompson, Secretary Rev. David Griswold, and Sargeant of Arms Mr. Eli Bias (Nunn Ex. 9). Welch also met with Ms. Janet McMickens, a CDC administrative staff member. Webb, Bias, and McMickens accompanied Welch to Washington, D.C. (before the Swanton application was filed) to meet Welch's consulting engineer and FCC counsel (Tr. 112-113).

15. Webb, Bias and McMickens also went with Welch meet with BROADCAP, a venture capital group that assists minorities in television and radio acquisitions. On this trip CDC covered its own members' expenses and paid Mr. Welch's hotel bill. Mr. Welch paid for his own air fare (Tr. 117-120).

16. Mr. Webb and Ms. McMickens went with Mr. Welch to locate the first transmitter site (Tr. 165); Messrs. Webb and Bias helped Welch in locating the second site; and Harris Corporation sent equipment prices to Ms. Carolyn Steward, a CDC staff member (Swan Creek Ex. 4, Tr. 168).

17. CDC paid no engineering expenses, no filing fees, no attorneys fees. Mr. Welch paid for the publication costs. In fact CDC's only monetary contribution are the expenses payment previously referred to. *See* Finding 15 *supra*, and Tr. 131-132. However, when CDC bowed out of the picture, and to give the reader some idea of how precarious Welch Communications, Inc.'s financial structure must be, in order to prosecute the application Charles Welch has had to borrow money from his father-in-law Amos Chester, and Otis Greene, a friend of his (Tr. 132-141).

18. Mr. Paul Jones (see Findings 10-11 *supra*.) was not involved with CDC before the Welch application was organized. He didn't accompany Mr. Welch and the CDC representatives to Washington for the meetings with the consulting engineer, the attorney, or BROADCAP. Jones didn't participate in locating either or the two transmitter sites; he had nothing to do with preparing Welch's application; and Welch never discussed preparing the application's programming statement with Jones, even though he (Jones) was originally proposed as the program director at the Swanton FM station. It was Welch alone who decided on the proposed station's format, because he "didn't have to confer with him [Jones] about the programming." (Nunn Ex. 7; Tr. 125, 127, 164-165, 169).

19. The resolution CDC passed (Finding 13 *supra*.) makes no reference to Jones' participation in the Swanton application, nor did it mention Jones' authority to act on CDC's behalf in corporate affairs (Ex. 8, Tr. 109). In May 1988, CDC's attorney advised CDC to pull out of the project because there was " . . . too much at stake for them." So CDC advised Charles Welch by telephone in May 1988 that they were withdrawing from the project leaving Welch " . . . high and dry . . . " (Tr. 99, 159-160, 166). This led to the filing of the June 23, 1988 amendment. *See* Tr. 99, and Footnote 7 *supra*.

20. Based on Findings 8-19 *supra*., it is evident that the proposed ownership and financial structure that Welch Communications, Inc. propounded to the Commission when they filed their application on August 27, 1987, is radically different from the ownership and financial structure they tried to prosecute through the hearing. Their original ownership structure representations were not firm, and neither was their original financial structure. In fact, even today, Welch's financial underpinning is suspect. Stated another way, their original ownership and financial structure; i.e., the one they must rely on is a sham, and even their amended financial structure is highly suspect. This approach, attempting to secure comparative credit for an integration proposal that the HDO specifically labels inappropriate warrants condemnation. Welch's integration proposal is rejected.[8] They will be credited with 0% quantitative.

21. Welch proposes no integration for Paul Jones or any CDC member. However, Welch Communications proposes to fully integrate Charles Welch into the station's day-to-day operations. Mr. Welch will work full-time (at least 40 hours a week) as general manager. In that capacity he will develop the station's overall policy for sales, personnel, programming, finances, employment, and community relations. He will supervise all department heads, oversee all hiring and firing, and implement the station's EEO program.

22. Charles Welch presently resides in Toledo, Ohio, 12 miles east of Swanton. He has lived there for the past 10 1/2 years. His residence is within the proposed station's 1 mV/m contour. If Welch Communications' application is granted, Mr. Welch and his family will move to Swanton.

23. Mr. Welch has *broadcast experience*. In 1969, he started as an announcer for WKLR-FM, Toledo, Ohio. He was promoted to Program Director after eight months. Six months after that he was promoted to Station Manager. He was WKLR's Station Manager for nine years. He left in 1979 and went to work as Sales Manager for KCOH-AM, Houston, Texas. In 1980 he left KCOH, and became General Manager of WWWS-FM in Saginow, Michigan. He worked there only until 1981.

24. From 1982 to 1987, Welch worked for WVOI-AM, Toledo, Ohio. He started as Sales Manager and Announcer; eight months later he was promoted to General Manager (Welch Ex. 2). WVOI fired him after his employer discovered that he had applied for the Swanton FM station. He was then employed by WUPW as an Account Executive.[9] Now he is a Sales Manager for Barden Cablevision, a cable television company.

25. Mr. Welch *claims* civic participation for several organizations that are located in Toledo. However, he has failed to show that those organizations are within his proposed 1 mV/m contour, a contour that only covers the westernmost portion of Toledo (Welch Ex. 5; Tr. 174).

26. Charles Welch seeks the integration enhancement due a Black, nón-hispanic male.

27. Welch Communications proposes to install auxiliary power which will permit operations during emergencies and power outages (Welch Ex. 4).

28. Welch Communications has no ownership interest in or connection with any other media of mass communications. Charles Welch owns a 0.00004% interest in Jacor Communications Inc. Jacor is the licensee of several AM and FM stations. Mr. Welch's infinitesimal holding is not attributable for diversification of mass media purposes.

Swan Creek Communications

29. Swan Creek, an Ohio General Partnership, has the following ownership structure (Swan Creek ex. 1, p. 1):

CHART

Principal	Position	Interest
Jerry Toth	General Partner	51%
Thomas Gardull	General Partner	49%

30. At the time of the hearing Swan Creek had an FM application pending for Lima, Ohio (BPH-880407MD). That application has since been dismissed. Thomas Gardull was a 33% General Partner in Fulton Broadcasters, an FM applicant for Wauseon, Ohio (BPH-88 60123NS). That application has since been dismissed with prejudice (see FCC 88M-1487, released May 17, 1988), and Fulton Broadcasters has since been dissolved.[10] Other than the applications listed above, neither Swan Creek nor its principals have any ownership interest in or connection with any other media of mass communications. *See* Swan Creek Ex. 1 at 1; Ex. 2 at 1; Ex. 3 at 1).

31. Swan Creek claims 100% quantitative integration. They intend to integrate both general partnerships into the proposed station's day-to-day operation.

32. First, Swan Creek will fully integrate its 51% General Partner, Jerry Toth into the proposed station's day-to-day operations. Toth will be full-time (at least 40 hours a week) General Manager, Program Director, and Sales Director. In his capacity as General Manager, Mr. Toth will supervise and work with all station personnel, both full-time and part-time; he will exercise full responsibility for fully operating the station; he will hire and fire; he will oversee marketing, programming and finances; he will maintain community relations; he will negotiate and confer with legal counsel; and he will insure that the station complies with the Communications Act, and the FCC's rules and regulations.

33. As Program Director, Mr. Toth will establish the station's format, and oversee the acquisition of programming to fit that format. As Sales Manager he will establish advertising rates and sales strategies, and directly coordinate and supervise the sales staff.

34. Jerry Toth was born April 20, 1950 (Tr. 286). For the past 30 years he has resided in Oregon, Ohio, outside the proposed station's service area, so he cannot claim *local residence*. But he will relocate to Swanton if Swan Creek is granted (Swan Creek Ex. 2;Tr. 301-302).

35. Mr. Toth presently works at Blue Chip Auto Parts, a business his father started in 1949. He is President of the company; his father is 65 years old and semi-retired. Toth and his further have discussed plans to either sell or liquidate the business if Swan Creek gets the grant. Mr. Toth also recently became a part-time weather announcer at WRED. He will resign from his position at the store and his position at the station, so he can devote his full time and energy to the Swanton station.

36. Toth has some *broadcast experience*. He started in 1969 as an announcer for WMHE. After he received his first class radiotelephone license in March of 1970, he went to work for WTTO, Toledo, Ohio as a Staff Engineer. By the time he left in November 1971 he was Assistant Chief Engineer. That same month Toth went to work for WOHO. He was hired as a staff engineer, but by the time he left he was Program Director, Music Director, and Production Director. In March 1974 he started working for WTOD. He put their entire music library on cart; he wrote commercials; and he coordinated remote broadcasts for its sister station WKLP. From April to December he worked for WANR as a weekend announcer, and from July 1976 to December 1980, Toth worked as a part-time engineer at WGOR.

37. Jerry, a *White, non - hispanic male* can claim no *civic participation*.

38. Swan Creek also intends to fully integrate its 49% General Partner Thomas Gardull into the proposed station's day-to-day operations. Gardull will work full-time (at least 40 hours a week) as the station's Chief Engineer, Operations Director, and Assistant General Manager. As Chief Engineer he will take responsibility for all engineering and technical aspects of the station, and supervises the staff engineers and technical personnel. As Operators Director he will coordinate and supervise the preparation and production of programming. As Assistant General Manger he will assist Jerry Toth and will carry out the General Manaer's duties in Toth's absence.

39. Thomas Gardull was born on April 18, 1949. He has lived in Toledo in the eastern portion of the city all of his life. However, his residence is not within the area of the proposed Swanton station so he cannot claim *local residence*, and he does not claim *civic participation*. If Swan Creek is granted Gardull will move to Swanton and establish a permanent residence there.

40. Mr. Gardull has *broadcast experience*. He began in 1973, as a Radio Engineer at WTTO(AM), Toledo, Ohio. He remained at the station through several ownerships and call letter changes until 1981. From 1976 to 1981 he was Chief Engineer. Then, from 1982-1985, Gardull was Chief Engineer at WAAM(AM), Ann Arbor, Michigan. Since 1985, he has been Chief Engineer at WHND(AM), Monroe, Michigan and Assistant Chief Engineer at WCSX(FM), Detroit, Michigan. He will resign from his position if Swan Creek is granted.

41. Gardull worked part-time as a Staff Enginer for WLQR(FM) Toledo (1973-1980); for WHFD, Archibold, Ohio (1976-1984); and WSDS(AM), Ypsilanti (1983 to present).

42. Thomas Gardull is a *White, non - hispanic male*.

43. Swan Creek proposes to install auxiliary power which will permit operations during emergencies and power outages.

CONCLUSIONS OF LAW

1. Only two mutually-exclusive applicants remain in the running for FM Channel 297(a), Swanton Ohio: Welch Communications, Inc. (Welch Communications) and Swan Creek Communications, Inc. (Swan Creek).

2. Evidence was adduced on the only factual issue remaining, the standard comparative issue. Welch Communications and Swan Creek must then be analyzed under the criteria set out in the Commission's *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 395, as modified by subsequent Review Board and Commission decisions.

3. We will direct our comparative analysis toward the Commission's two primary objectives: (1) selecting the applicant that will offer the greatest diffusion of control of mass media (diversification) and (2) selecting the applicant that will offer the best practicable service to the public.

4. *Diversification of Mass Media*. No comparative preference will be awarded under the Commission's first primary objective. *See* Findings 28 and 30 *supra* Neither Welch Communications nor Swan Creek or any of their principals have any attributable ownership interest in or connection with any media of mass communications. So the diversification of mass media criterion will play no role in determining our comparative winner.

5. *Best Practicable Service*. We turn then to the Commission's second primary objective: selecting the applicant that will offer the best practicable service to the public. We may need to evaluate as many as four criteria. We may need to consider: (1) whether either applicant should be preferred because of a superior areas and populations proposal (comparative coverage); (2) the degree each will integrate their ownership into the day-to-day management of the proposed station (quantitative integration); (3) the qualities each integrated owner will bring to that day-to-day management (qualitative integration); and (4) whether the degree of quantitative and qualitative integration each will bring is enhanced by minority and/or female ownership. If it becomes necessary to evaluate criterion 3 (qualitative integration) we will examine such factors as local residence, participation in civic affairs within the proposed service area, past education and business experience, past broadcast experience, and auxiliary power.

6. *Criterion 1*: *Comparative Coverage*. Swan Creek will be awarded a *slight* comparative preference over Welch. Swan Creek will serve almost 85,000 more people than Welch, and bring a 5th daytime an nighttime primary service to 1900 more people than Welch will. *See* Findings 5-7 *supra*.). However, the slight advantage Swan Creek will garner is far from being decisional.

7. *Criterion 2*: *Quantitative Integration*. This criterion proves to be decisional. Both Swan Creek and Welch claim 100% quantitative integration. But Swan Creek has sustained their claim, Welch hasn't. Compare Findings 32-42 *supra*. with Findings 8-20 *supra*.

8. Welch has tried to press a comparative integration claim for an ownership structure that they were expressly told by the Chief Audio Services Division they could not. *See* Findings 8 and 20, and Footnote 7 *supra*. The reason why Welch tried to prosecute an ersatz proposal is because it's original application's ownership structure had become unraveled and had fallen apart. In May, 1988 (about nine months after BPH-870827MY had been filed), one of Welch's 50% stockholders, Community Development Center, withdrew from the application and left the other 50% stockholder, Charles Welch, high and dry. *See* Findings 8-19 *supra*.

9. In summary, from a quantitative integration standpoint, Welch Communication's proposal is a sham, Swan Creek's isn't. So Swan Creek will be awarded 100% quantitative integration to Welch's 0%. Since Welch Communications is being credited with 0% integration, it will not be considered further. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 50 RR 2d 1117 (1981); *Van Buren Community Service*, 87 FCC 2d 1081, 50 RR 2d 115 (1981); and *Cannon Point Broadcasting Co.*, 93 FCC 2d 643 (Rev. Bd. 1983) at 649.[11]

Ultimate Conclusion of Law

10. Under Issue 2 we must determine pursuant to the evidence addressed under the standard comparative issue which of the two remaining applications should be granted, if any. It's no contest. Swan Creek's is superior by far to Welch Communications. Swan Creek's 100% quantitative integration puts them decisively ahead of Welch Communication's 0% integration. Thus we don't need to evaluate criteria 3 and 4. *See* Conclusion 5 *supra*. and the case cited in Conclusion 9 *supra* Swan Creek will offer the best practicable service to the public and is declared the winner.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, Swan Creek Communications' application (BPH-870827NJ) IS GRANTED; and

Welch Communications, Inc.'s application (BPH-870827MY) IS DENIED.[12]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] *See* FCC 89M-131 released January 17, 1989, and FCC 89M-2714, released November 30, 1989.

[2] For organizational purposes and clarity the standard comparative issue, and the ultimate conclusionary issue have been renumbered.

[3] The Bureau addressed only the comparative coverage aspects of the case. *See* Finding 3 *supra*.

[4] Because of a post-cutoff engineering amendment (see 53 F.R. 43035 *supra*. at paras. 9 and 17, Welch's comparative coverage showing must be judged on a "worst case" basis; i.e., the lowest total areas and populations figures, and the least underserved areas.

[5] Welch apparently used the services of an incorporation service (Tr. 164,169).

[6] During the hearing Nunn Corporation was actively prosecuting their application, and Nunn's Washington counsel actively tested the representations that Welch made to the Commission in their (Welch's) application.

[7] Welch amended its application on June 23, 1988, after the time for filing amendments had passed. Consequently the HDO (53 F.R. 43035) at para. 9 specifically concluded that Welch couldn't improve its comparative position at that date. So Welch's reliance on that amendment is improper.

[8] However, comparative findings are being made on all of Welch's comparative presentation. So if an appellate body disagree with the way Welch's quantitative integration claim has been handled, no remand will be required.

[9] The Hearing Designation Order conditions any grant of Welch's application on Charles Welch's terminating his position at WUPW(TV). *See* 53 F.R. 43035 *supra*. paras. 7 and 18. Since Welch is no longer employed there, that condition is moot.

[10] The Hearing Designation Order conditions any grant of Swan Creek's application on Thomas Gardull's terminating his association with Fulton Broadcasters. *See* 53 F.R. 43035 *supra*. at paras. 8 and 19. Since Fulton Broadcaster's Wauseon application has been dismissed, and Fulton Broadcasters dissolved, that condition is moot.

[11] Note, however, that comparative findings were made under all four best practicable service criteria. *See* Footnote 8, and Findings 8-27 *supra*. It is only further comparative conclusions that aren't necessary.

[12] If exceptions aren't filed within 30 days, or the Commission doesn't reviw the case on its own motion, this Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WESTERN CALIFORNIA CELLULAR PARTNERS — File No. 10184-CL-P-709-A-88

For authorization to construct and operate a Domestic Public Cellular Radio Telephone System in Market No. 709, Wisconsin 2 - Bayfield Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: April 6, 1990; Released: May 8, 1990

By the Chief, Common Carrier Bureau:

1. Western California Cellular Partners (Western) was selected in a lottery on March 15, 1989, for the frequency Block A cellular license for Rural Service Area (RSA) Market No. 2, Bayfield, Wisconsin. On March 24, 1989, Western filed its original application and two paper copies, together with a map of its proposed Cellular Geographic Service Area (CGSA), drawn on a scale of 1:500,000. By letter dated May 5, 1989, the Mobile Services Division (MSD) dismissed Western's application as defective because "the applicant failed to submit the proper and full size 1:250,000 map as required by Sections 22.903(a)(1) and 22.913(a)(2) of the Commission's rules. The map also failed to provide a legend explaining the 39 dBu and the Cellular Geographic Service Area contours and a scale of statute miles."[1] Western has filed a Petition for Reconsideration (Petition) along with an amendment to its application which included a map on a 1:250,000 scale with a legend and scale. In addition, Western filed a Supplement to its petition. No responsive pleadings have been filed.

I. WESTERN'S CONTENTIONS

2. Western argues that its application should not be dismissed because the map was drawn on a 1:500,000 rather than a 1:250,000 scale map, because it failed to include a scale of statute miles,[2] or because it failed to identify the 39 dBu contours and its CGSA on the map. Western filed an amended map with its Petition, which was drawn on a 1:250,000 scale, and which identified the 39 dBu contours and CGSA. In its Supplement, Western argues that it is entitled to remedy the defect in the scale of its map, citing *Sun Communications, Inc. (Sun)*, 4 FCC Rcd 6429 (Com. Car. Bur. 1989), and that it may remedy a defect in the map legend, citing *U. S. West NewVector Group, Inc.*, 2 FCC Rcd 5431 (1987). Further, Western cites *Armstrong Telephone Company (Armstrong)*, 3 FCC Rcd 1665 (Com. Car. Bur. 1987), in which the Commission permitted amendment of a defective financial showing by a sole wireline applicant in order to avoid the licensing delay inherent in a new lottery. Western argues that it should, likewise, be permitted to amend its map. Alternatively, Western argues, the Commission should, *sua sponte*, grant it a waiver as it did in File No. 10112-CL-P-678-A-88, where it granted an application with alien general partners.

II. DISCUSSION

3. In *Sun*, 4 FCC Rcd at 6430, the Common Carrier Bureau ("Bureau") emphasized that a map drawn on a scale of 1:500,000 did not meet the requirements of Sections 22.903(a)(1) and 22.923(a)(1) of the Commission's rules. [3] However, we determined that the "scale of the map, while not the optimum for processing purposes, did not, by itself, prevent the staff from processing the application." *Id.* at 6430. We also noted that Sun Communications' map was legible, and had clear latitude, longitude, and scale markings. We therefore concluded that Sun Communications' submission of the 1:500,000 scale map, rather than the 1:250,000 scale map required by Section 22.903(a)(1) of the rules, was a minor error which could be cured by amendment. Based on our ruling in *Sun*, therefore, Western's submission of a 1:500,000 scale map, by itself, could have been corrected by minor amendment.

4. However, Western's map contains a further, serious, defect which requires dismissal of its application, namely, the absence of any indication of where the CGSA and 39 dBu contours lie. Western argues that the staff could "easily have gleaned the meaning of the lines on the map" and that "the map as drawn could hardly have been susceptible to any different interpretation than that the CGSA followed the 39 dBu contour, except with respect to [the] shaded area." However, the Commission staff is neither required, nor would it be prudent, to guess the meaning of ambiguous markings on a map. Section 22.903(a)(1) of the rules requires that the applicant draw the CGSA, and "[w]ithin the CGSA . . . depict each base station site and its respective 39 dBu contour. . . ." Western's map merely depicts a circle with a narrow shaded extension on one side. Without a description on the map describing the drawing, it is not clear what this drawing represents. There is nothing to indicate which lines represent the CGSA and the 39 dbu contour, and nothing to indicate the significance of the shaded extension.[4] Without this explanation, the map cannot be used by the staff for processing the application.

5. Section 22.20(a) of the Commission's Rules governs dismissal of defective applications. That rule states in pertinent part:

> . . . an application will be unacceptable for filing and will be returned to the applicant . . . if . . . [t]he application is defective with respect to completeness of answers to questions, informational showings, execution, or other matters of a formal character; or . . . [t]he application does not comply with the Commission's rules, regulations ... or other requirements.

Thus, Section 22.20 requires dismissal of defective applications, *i.e.*, those which are not acceptable for filing. The Commission has held that an application found to be defective under Section 22.20 may not be amended, because it is unacceptable for filing.

6. The Commission has held that filing an unusable map in a cellular application renders the application fatally defective and not curable by an amendment. In *REM Communication*, 3 FCC Rcd. 3705 (1988), the applicant filed an illegible map. The Commission found that an illegible map could not be used to process an application, and accordingly held REM's application to be fatally defective. Western's map is similarly unusable because there is no indication of the location of the CGSA, and the 39 dBu contours are not identified as such. The present case is therefore governed by the Commission's holding in *REM Communication*. Thus, Western's application was properly dismissed as unacceptable for filing.[5]

7. Western's argument that the Commission should grant it a " *sua sponte* waiver" in this case, because the Commission has granted a *sua sponte* waiver in another case in which an application was filed by a partnership with alien general partners, is rejected. The mere fact that a defective application may have been granted pursuant to waiver in a specific factual circumstance does not serve as precedent to justify grant of a defective application in this case. *See Clyde W. Pierce*, 4 FCC Rcd 2378, 2379 (1989). Furthermore, from a review of the file for the application specifically referenced by Western, there is no indication that any waiver was granted. In summary, we find no basis on which to grant Western a waiver of our rules.

8. Finally, we reject Western's argument that *Armstrong* provides support for its requested relief. In *Armstrong*, a sole wireline applicant provided a financial showing which complied with the "reasonable assurance" standard of proof rather than the new "firm financial commitment" standard required of cellular applicants in markets below the top 120. The Bureau permitted Armstrong to file a further letter from its bank stating the bank's firm commitment to finance the applicant. In so doing, the Bureau stated that:

> In general we will not examine or consider clarifying information or amendments of this nature. However, since Armstrong is the sole wireline applicant for this market we have considered its clarifying information because of the public interest factors involved. To reopen this proceeding to the entire application, lottery and petition to deny process, would most likely result in inordinate delay of both service and competition to the Charleston MSA and would be contrary of our goal of expeditiously providing this needed service. We stress that we are considering Armstrong's clarifying information only in these very limited circumstances. In future proceedings we will be inclined to do so, only where there are compelling public interest factors present.

It is clear that the Bureau's decision to accept Armstrong's clarifying information was strictly limited to the facts of that case. Those same facts are not present here. Western is a non-wireline applicant among many other non-wireline applicants for this market. Thus, *Armstrong* is inapposite to resolving the instant case.

9. We conclude that Western's application omitted important informational showings and failed to comply with the Commission's rules, which, pursuant to Section 22.20(a)(1)-(2), renders the application fatally defective. The application may not be amended because it is not acceptable for filing. Accordingly, we must dismiss Western's application.

ORDERING PARAGRAPH

10. WHEREFORE, the foregoing premises considered, IT IS HEREBY ORDERED that the Petition for Reconsideration filed by Western California Cellular Partners IS DENIED and the Mobile Services Division's dismissal of Western California Cellular Partners' application IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] While the letter dismissing Western's application cited Section 22.913(a)(2) of the Commission's rules, that Section, in fact, governs information to be filed with applications for Metropolitan Statistical Areas (MSAs). Section 22.923(a)(1) governs information to be filed with applications for Rural Service Areas. The identification of Section 22.913(a)(2) as the rule which was violated was a typographical error. The application was in reality dismissed pursuant to Section 22.923(a)(1) of the rules.

[2] The staff's letter stated that Western's map lacked a scale of statute miles, as required by Section 22.2 of the Rules. However, the scale of the map, 1:500,000, which was contained on the face of the map, satisfies this requirement. Therefore, we find that Western's map was not deficient in this respect.

[3] Section 22.903(a)(1) states, in pertinent part, as follows:

> The CGSA must be drawn on one or more U.S. Geological survey map(s) with a scale of 1:250,000. For RSAs the CGSA map need only depict the area(s) encompassed by any CGSA(s) within the RSA (and that portion of the RSA visible on the map) and must clearly depict on the face of the map the longitude, latitude and scale pursuant to Section 22.2. Within the CGSA, the applicant must depict each base station site and its respective 39 dBu contour. . . .

Section 22.923(a)(1), incorporating Section 22.903(a)(1) by reference, states that the application's map exhibit "shall contain all the information specified in Section 22.903(a)(1)."

[4] The amended map submitted with Western's Petition indicates that the circle represents the CGSA boundary, the shaded extension depicts that portion of the CGSA not within the 39 dBu contour, and the 39 dBu contour is co-extensive with the CGSA except for the shaded area.

[5] *See also* Petitions for Reconsideration of the Return of Round IV Cellular Applications for Having Defective Maps (*Round IV*), 103 F.C.C.2d 366, 371 (1986). In *Round IV*, the Commission upheld dismissal of an application when the ac-

companying map lacked clear latitude and longitude markings. The Commission held that "very significant" information had been omitted, thus rendering the application blatantly defective and unacceptable for filing. Western, in failing to include a legend explaining where the CGSA and 39 dBu contours lie, also omitted "very significant" information, and its application is also unacceptable for filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 12, 1990

Released: May 8, 1990

Great Alaska Electric Radio Co., Inc.
3000 A Street
Anchorage, Alaska 99503

Northern Television, Inc.
1007 West 32nd Street
Anchorage, Alaska 99503

Dear Applicants:

This letter is in reference to your application (BALH-890929GX) seeking the Commission's consent to the assignment of the license of station KINQ(FM), Fairbanks, Alaska from Great Alaska Electric Radio Co., Inc. (Great Alaska) to Northern Television, Inc. (Northern TV). In addition to being the licensee of FM station KINQ(FM), Great Alaska is also the licensee of AM station KBCN, Fairbanks. Great Alaska is controlled (85.2%) by Pacific Rim Broadcasters, Inc., Debtor-in-Possession (Pacific Rim).

Northern TV, the assignee, is the licensee of stations KTVF(TV) and KCBF(AM), Fairbanks, Alaska. Section 73.3555(b) of the Commission's Rules generally provides that television/radio combinations cannot be created where the Grade A contour of the television station encompasses the city of license of the radio station. Accordingly, Northern TV has requested a waiver of the rule.

In support of the waiver, the applicants state that Great Alaska and its parent company, Pacific Rim, are experiencing severe financial difficulties. Station KINQ(FM) has been off the air sporadically for almost three years and off the air continuously since March 23, 1989. Station KBCN(AM) has been dark since November 30, 1987. Additionally, Pacific Rim was forced to declare bankruptcy on April 7, 1988. Applicants have attached a copy of the bankruptcy petition to their application. It shows that Pacific Rim's total assets are $1.8 million and its liabilities are $4.6 million.[1]

In *Amendment of Section 73. 3555*, 4 FCC Rcd 1741, *reconsidered in part*, 4 FCC Rcd 6489 (1989), we set out standards for reviewing requests for waivers of the rule. The Commission decided that it would look favorably upon waiver requests involving ownership of failed stations that have not been operational for a substantial period of time (*e.g.*, four months) or stations that are involved in bankruptcy proceedings. *Id.* at 1752. In either of these situations, an applicant requesting a waiver of the rule would be required to provide relevant documentation. *Id.* Here there is proof of both. Great Alaska has represented that it has been silent since March 23, 1989, which is confirmed by our records. Further, the staff has granted a *pro forma* application to transfer control of Great Alaska from Pacific Rim to Pacific Rim, Debtor in Possession. The failed-station standard clearly applies in this case. Accordingly, Great Alaska's request for waiver of Section 73.3555(b) of the Commission's Rules is granted.

As a final matter, we note that an informal objection to the grant of this application was filed by J. Stephen Lay (Lay) on November 20, 1989. The basis of his objection is that Pacific Rim is allegedly indebted to him as a result of a prior sale of the station. The Commission has a long-standing policy of not involving itself in private contractual disputes of this type. *John L. Runner, Receiver (KBIF)*, 36 RR2d 773, 778 (1976); *Transcontinent Television Corp. (WRVC - TV)*, 21 RR 945 (1961). Since Lay has not shown that the applicants are unqualified, we deem that Lay's objection is not an impediment to the grant of this application. Accordingly, the objection filed by J. Stephen Lay on November 20, 1989 will be denied. We further find that the applicants are fully qualified and that a grant of the application will serve the public interest, convenience and necessity. Accordingly, the objection filed by J. Stephen Lay is denied and the application (BALH-890929GX) is granted.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Furthermore, the applicants contend that the proposed assignment of station KINQ (FM) to Northern TV will result in substantial public interest benefits, including significant cost savings, and programming and service benefits. Moreover, it is argued that the Commission has in the past recognized that there are unique and unusual circumstances to consider when Alaskan broadcast markets are involved. *See KINY Associates*, 50 RR2d 981, 982 (1981); *Evangelistic Missionary Fellowship*, 75 FCC2d 724, 725 (1980); *Multiple Ownership, Second Report and Order, 50 FCC2d 1046, 1054 n. 6 (1975).*

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 18, 1990

Released: May 8, 1990

Glendive Broadcasting Corporation
c/o J. Brian DeBoice
Cohn and Marks
Suite 600
1333 New Hampshire Avenue, NW
Washington, DC 20036-1573

Re: Stations KXGN-TV and KXGN(AM)
Glendive, Montana
BTCCT-890928KF
BTC-890928KG

Gentlemen:

This is with respect to your above-captioned applications for transfer of control of 100 percent of the stock of Glendive Broadcasting Corporation (GBC), licensee of Stations KXGN-TV (Channel 5, CBS/NBC) and KXGN(AM) in Glendive, Montana, from Lewis Moore and members of his family to Stephen A. Marks. In view of Marks' proposed ownership of co-located radio and television stations, you have requested waiver of Section 73.3555(b) of the Commission's Rules.[1]

In support of your waiver request, you state that Stations KXGN-TV and KXGN(AM) have been co-owned by the same majority shareholder, Lewis Moore, since the television station became operational in 1957. You assert that, during that time, the stations have shared studio facilities, transmission tower facilities, and staff, thereby saving the licensee approximately $60,000 per year in salaries alone. As a result of these savings and economies of scale, you contend that the stations are able to provide significant local news and public affairs programming that would not be economically feasible otherwise. You assert that, absent common ownership, the AM station, which is currently subsidized by national advertising revenues generated by the television station, would be forced either to eliminate local programming and shift entirely to automated operations or shut down altogether, and that the television station would be forced to cut back substantially on its existing level of local programming. You maintain that the stations are currently operating near the break-even point, and you have submitted financial statements for the past two years, which indicate a combined before-tax profit of only $9,616 in 1987 and a $54,642 loss in 1988.

You add that the Glendive market is severely depressed and argue that sale of the stations separately is not a realistic option. In this connection, you note that the community of Glendive has a population of only 6,000 and is the smallest television market in the nation (212th-ranked according to the 1989 statistics of the Arbitron Rating Service) with only 5,000 television households. You assert that the general economy of Glendive is at its lowest point in the last 40 years. This, you state, is due, in part, to a weakening in the agricultural economy caused by a drought and lower agricultural prices. You add that lower oil and gas prices have caused several exploration companies to leave the area. As a result, you indicate that many industries and businesses have abandoned Glendive, thereby leaving the area severely depressed economically. You further note that, while KXGN-TV is a VHF facility, it operates at 14.8 kW effective radiated visual power from a tower that is only 500 feet above average terrain. Additionally, you state that KXGN(AM) is a Class IV AM facility operating on 1400 kHz with a power of 1 kW and with a 2mV/m signal that reaches only about 18 miles from the transmitter. You therefore maintain that the types of facilities involved are of little significance here, since both the television and radio station are relatively small operations with limited service areas.

Although Glendive is the smallest television market in the country, you assert that it is a competitive one, because five other VHF television stations licensed to other communities provide service to parts of the Glendive market.[2] In addition, you state that two other radio stations (one AM and one FM) are licensed to Glendive with six other radio stations providing service to the market. You add that Glendive is served by a 36-channel cable television system that has a 65-percent penetration rate and that eight other communities within KXGN-TV's Grade B contour receive service from other cable systems. Further, you indicate that two weekly newspapers are published in the Glendive Area of Dominant Influence (ADI) and that a Billings, Montana, daily newspaper and a Sidney, Montana, weekly newspaper have high circulation rates in the Glendive area. You also state that there are four low power television stations within the Glendive ADI. Because there are so many available media voices competing for limited advertising revenues, you contend that continued common ownership of the television and AM radio facilities is warranted.

In considering waivers of Section 73.3555(b) of the Rules, the Commission considers several factors: (1) the economies of scale, cost savings, and programming and service benefits that result from the proposed combination; (2) the types of facilities involved; (3) whether the applicant already owns other media outlets in the market; (4) whether the stations involved have long been offered for sale, to no avail; and (5) whether the Commission's traditional diversity and competition concerns would not be adversely affected. *Amendment of Section 73. 3555*, 4 FCC Rcd 1741 (1988), *reconsidered in part*, 4 FCC Rcd 6489 (1989).

We have carefully reviewed your request for waiver and your detailed showings' in support of that request. Initially, we note that the number of separately' owned media voices in the market will not be diminished here, since the current' owners of Stations KXGN-TV and KXGN(AM) have operated them jointly for more' than 30 years. The grant of the requested waiver will simply maintain the' long-established status quo. *See Great American Television and Radio Co., Inc.*, 4 FCC Rcd 6347 (1989).

Turning to the case-by-case criteria, you have shown that substantial economic efficiencies have been and will continue to be realized from the combined operation of the stations and that the savings you will realize will assure the maintenance of a local broadcast service to the

community. During the more than 30 years of joint operation of the stations, it appears that the facilities of the AM and television stations are interdependent with shared equipment, studios, transmission facilities, and staff. In that connection, you have shown that joint operation of the stations saves approximately $60,000 annually on salaries and studio building rent and would save a large one-time expenditure of funds for separate facilities.

With respect to the types of facilities at issue, although KXGN-TV is a VHF station, it operates with very modest facilities. The radio station is a Class IV facility with a 2 mV/m signal that reaches only 18 miles.

The third factor deals with the number of media outlets the transferee already has in the market. Marks has no other media outlets in the market.

The fourth factor is concerned with the financial difficulties of the stations in question and whether they have been offered for sale separately. In this connection, it appears that the Glendive area is suffering through a depressed agricultural economy and a downturn in the business community caused by falling oil and gas prices. This has had an adverse impact on the profitability of the stations, which lost money during 1988. The applicants have furnished financial statements indicating that television revenues are helping to support the radio station, despite the fact that KXGN-TV itself is only a marginal operation. Given the economic circumstances in the market and the longstanding dependence of the AM station on the benefits of joint AM-TV operation, the applicants assert their belief that the AM station could not operate as a stand-alone facility. Accordingly, the applicants state that they have not offered the AM and television stations for sale separately because to do so would, in their view, be financially unrealistic and would likely cause the demise of the radio station. Ordinarily, we would expect an applicant which asserts that individual operation of the stations comprising its grandfathered radio and television combination is not economically feasible to have made an effort to sell those facilities separately. In this case, however, involving the smallest television market in the country, containing only 5,000 television households, we believe it is reasonable to accept the applicant's uncontested assertion that separate operation is not financially viable. We note, moreover, that financial difficulties, as present here, are especially relevant in smaller markets such as Glendive. *See Amendment of Section 73. 3555 (Reconsideration Order)*, 4 FCC Rcd at 6491-92.

The final factor in our case-by-case review is concerned with the nature of the relevant market in light of our traditional diversity and competition concerns. As we stated, Glendive is the smallest television market in the country with only 5,000 television households. Thus, despite the fact that KXGN-TV is the only off-the-air television signal received in Glendive and much of the Glendive ADI, it has a very small viewing audience. In addition to KXGN(AM), there are also two radio stations (one AM and one FM), under separate ownership, licensed to Glendive. Six other radio stations from nearby communities also serve Glendive and compete for advertising dollars there. There are also three cable television systems in the area. The Glendive cable system has a 65-percent penetration rate and carries broadcast signals of Stations KUSA-TV (ABC), Denver; KUSM-TV (PBS) Bozeman, Montana; KUED-TV (PBS) and KUTV-TV (NBC), Salt Lake City; and WTBS-TV, Atlanta, as well as a number of other satellite channels. Other media outlets in the market include one daily and three weekly newspapers and four low power television stations. Thus, even if the subject application were granted, there would still be some, though relatively few, diverse voices in Glendive. Moreover, denial of the requested waiver would not likely advance our interest in diversity because such action could well precipitate the loss of an existing station. In any event, grant of the request would not reduce diversity in the community given the longstanding common ownership of the television and AM facilities at issue.

Having found both the transferee and the transferors to be fully qualified, we conclude that grant of the applications would serve the public interest, convenience, and necessity. Accordingly, your request for waiver of Section 73.3555(b) of the Rules and your applications for transfer of control of the stations ARE GRANTED, effective upon the date of adoption of this letter.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] When the Commission first adopted the one-to-a-market rule in 1970, *Multiple Ownership of Standard, FM and TV Broadcast Stations*, 22 F.C.C. 2d 306 (1970), *reconsidered in part*, 28 F.C.C. 2d 662 (1971), it grandfathered existing combinations such as Stations KXGN-TV and KXGN (AM). Note 4 to the current version of the rule provides, however, that a grandfathered combination "may not be assigned or transferred to a single person, group or entity . . . ."

[2] of the five listed by the applicants, only three (KUMV-TV) and KXMD-TV, Williston, North Dakota, and KSUS-TV, Miles City, Montana) place a predicted Grade B signal over portions of the two-county Glendive market, but none of these provide the community of Glendive with a predicted Grade B signal.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-154

In re Applications of

MICHAEL SCOTT COPELAND (hereafter: Copeland) — File No. BPH-880427MA

CLARENCE W. TAYLOR (hereafter: Taylor) — File No. BPH-880428MB

Betty B. Raines and Threasa Davis d/b/a B AND T BROADCASTING (hereafter: B and T) — File No. BPH-880428MD

HOFFMAN MEDIA, INC. OF VIRGINIA (hereafter: Hoffman) — File No. BPH-880428MI

TINKER CREEK BROADCASTERS, INC. (hereafter: Tinker Creek) — File No. BPH-880428MV

For Construction Permit for a New FM Station on Channel 291A, Vinton, Virginia

HEARING DESIGNATION ORDER

Adopted: March 8, 1990; Released: May 8, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Financial.* Section III of FCC Form 301 asks each applicant to certify whether or not it has sufficient net liquid assets on hand or available from committed sources to construct and operate the requested facility for three months without revenue. When Taylor filed his application on April 28, 1988, he answered "no" to that question, adding the statement: "The applicant will certify as to his financial qualifications by amendment." When B and T filed its application on April 28, 1988, it answered "no" to that question, adding the statement: "Application will be amended." However, in both cases, no such amendment was ever filed. Accordingly, a financial issue will be specified against Taylor and B and T.

3. *Tinker Creek.* Pursuant to 47 C.F.R. § 1.65, applicants are required to timely amend their applications so as to keep them substantially complete and accurate. Whenever information furnished in a pending application is no longer substantially complete and accurate in all significant aspects, or whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant is required to amend his application to furnish such information as may be appropriate within 30 days. Tinker Creek filed one such amendment. However, staff investigation reveals the existence of errors and/or omissions within the amendment such that it cannot be considered to have accurately updated Tinker Creek's application. First, Tinker Creek reported that it has entered into a settlement agreement that will, upon FCC approval, result in dismissal of its January 4, 1988 application for an AM station for Kitty Hawk, North Carolina (BP-880104AD). However, Commission records show only that this application was returned on January 5, 1989, and was resubmitted for, but has not yet been granted, reinstatement *nunc pro tunc*. Second, Tinker Creek reported that the same settlement agreement provides for the withdrawal of its Petition for Reconsideration of the dismissal of its June 1, 1987 application for an AM station for Midlothian, Virginia (BP-870601AC). However, Commission records show only that this application was designated for hearing on November 28, 1988, Dkt. 88-551. Third, Tinker Creek failed to report both the designation for hearing on November 28, 1988, Dkt. 88-551, and the subsequent dismissal on September 1, 1989, of its June 1, 1987 application for an AM station for Kitty Hawk, North Carolina (BP-870601AB). Accordingly, Tinker Creek will be required to file an amendment with the presiding Administrative Law Judge completely and accurately updating its application with respect to all broadcast interests as required by 47 C.F.R. § 1.65, or an appropriate issue will be specified by the Judge.

4. *Late - filed Amendment.* Tinker Creek petitioned for leave to amend its application on June 15, 1989. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

5. *Areas and Populations.* Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. *Air Hazard.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna supporting structure proposed by Copeland, Taylor, B and T, Hoffman and Tinker Creek would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Taylor and B and T are financially qualified to be a Commission licensee.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Copeland, Taylor, B and T, Hoffman and Tinker Creek would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Tinker Creek will be required to submit an amendment completely and accurately updating its application as required by 47 C.F.R. § 1.65 to the presiding Administrative Law Judge.

10. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed by Tinker Creek IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Metro Program Network, Inc.,
Licensee of Television Station
KOCR(TV), Cedar Rapids, IA

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 1990; Released: May 8, 1990

By the Commission:

1. The Commission has under consideration (1) a $20,000.00 Notice of Apparent Liability (NAL) issued November 13, 1989, to Metro Program Network, Inc. ("Metro"), licensee of KOCR(TV), Cedar Rapids, IA, and (2) the response of Metro dated December 13, 1989.

2. The forfeiture was assessed for apparent willful and repeated violations of Section 73.1620(a) of the Commission's Rules and Section 301 of the Communications Act of 1934, as amended, resulting from the station's operation from an unauthorized location. As explained more fully in the NAL, 4 FCC Rcd 8026 (1989), Metro built its facilities at substantial variance (25.4 miles) from the location authorized by the Commission. Accordingly, KOCR was not authorized to initiate program test authority as it did on February 1, 1988.

3. In its response to the NAL, Gerald Fitzgerald, President of Metro, admits that the station's facilities were not constructed as authorized, and that Metro failed to obtain the Commission's consent prior to modifying the specifications. He claims "oversight" as the basis for not filing the necessary modification applications as required by the Commission's Rules. Metro states further that construction of the tower had been completed for at least five months and that the station had already begun operation before it realized that it had failed to apply for a construction permit (CP) modification or a license to cover the new facility. Fitzgerald indicates that he was engaged in construction of another television station at the same time as KOCR's construction, and, he states, "nearly all of my time was devoted to this station and its operation" and that "several important matters failed to get my attention during this time."

4. In the response by Metro, Fitzgerald indicates that in conversations with the Commission field representative inspecting the station on March 1, 1988, he understood the concerns expressed as to station location to be referring to studio rather than transmitter location.[1] Fitzgerald admits, however, to realizing later that the Commission was, in fact, concerned with the change in the location of the station's transmitter, tower and antenna and the operation of those facilities from the new location.

5. Finally, the licensee requests that the amount of the forfeiture be reduced or rescinded, stating that a forfeiture in the amount specified in the NAL would create a financial hardship to Fitzgerald personally and to the station's ability to provide service. Metro states that the publicity resulting from the alleged violations has made the sale of advertising time difficult and that it has become increasingly difficult to borrow funds.

6. After careful consideration of these arguments and the circumstances of this case, we are not persuaded to rescind or reduce the forfeiture. Licensees are required to operate in strict compliance with all Commission Rules and policies. The Commission cannot accept "oversight" caused by the press of business as justification for failure to comply with its rules. *Shamrock Broadcasting, Inc.*, 2 FCC 2d 492 (1966); *see also Triad Stations, Inc.*, 52 FCC 2d 607 (1975); *KUSN Corporation*, 6 FCC 2d 282 (1967) (inadvertence and mistake are not defenses to violations of Commission Rules).

7. It is essential that permittees and licensees construct facilities in strict compliance with the specifications set forth in their construction permits in order to avert serious air navigation hazards and avoid interference to other broadcast stations. *Liability of Equivox*, 87 FCC 2d 1099 (1981). The licensee has presented no reason why its operation of the station after its construction at an unauthorized location should be excused. To excuse the licensee's conduct in this regard would render ineffectual the Commission's licensing processes as it would, in effect, allow licensees to obtain an authorization to construct at one location and then build and operate at whatever location was convenient, without Commission approval.

8. With regard to the request for a reduction or rescission of the forfeiture on the basis of financial hardship, the licensee has failed to provide the required financial documentation to support such a claim.[2] Nevertheless, based on the claim of financial hardship we will permit the licensee to pay the forfeiture on an installment basis. This installment plan will consist of ten monthly installment payments of $2,000.00 each. The first payment will be due on the first day of the second full month following the release of this Order and subsequent payments will be due on the first day of each of the nine consecutive months thereafter.

9. Based upon the foregoing, we find no basis upon which to disturb the imposition of the forfeiture liability. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED that Metro Network Program, Inc., Cedar Rapids, IA, FORFEIT to the UNITED STATES OF AMERICA the sum of Twenty Thousand Dollars ($20,000) for its repeated and willful violation of Section 301 of the Communications Act of 1934, as amended, and Section 73.1620 of the Commission's Rules in accordance with the installment plan specified above. Payment of the forfeiture may be made by mailing to the Commission checks or similar instruments payable to the Federal Communications Commission. The payments should be mailed to the Forfeiture Unit, Financial Services Branch, FCC, Box 19209, Washington, D.C. 20554, or delivered to the Forfeiture Unit, Financial Services Branch, Room 452, 1919 M St., N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] While it is unclear from the response, Fitzgerald presumably thought the discussion related to the Commission's "main studio rule." That rule was amended June 9, 1987, to allow, in part, a licensee to relocate its station's main studio from "one point within the principal community contour to another point within it, without specific FCC authority." That rule, while totally irrelevant to the matter under consideration here, explicitly provides, however, that upon such a move, " *notification to the FCC in Washington shall be made promptly.* " 47 CFR § 73.1125 (emphasis added).

[2] The licensee was provided with information regarding the actions which may be taken in response to the NAL, pursuant to Section 1.80 of the Commission's Rules. These instructions stated in part:

> If, in response to this forfeiture notice, you claim a financial inability to pay the full amount of the forfeiture, you should furnish data to support your claim. The data submitted should include, but need not be limited to a profit and loss statement that has been prepared under generally accepted accounting principals. The statement that you furnish should contain no data older than one year from the date of your response.

ATTACHMENT to NAL, issued November 13, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-387

In the Matter of

Amendment of Environmental Rules

FIRST REPORT AND ORDER

Adopted: April 6, 1990; Released: May 9, 1990

By the Commission:

INTRODUCTION

1. In this Report and Order, the Commission adopts the rule amendments proposed in the Notice of Proposed Rule Making in this proceeding.[1] Specifically, the Commission amends section 1.1312 of its rules, 47 C.F.R. § 1.1312, to require that in situations where construction of a Commission-regulated radio communications facility is permitted without prior Commission authorization, the licensee or applicant must determine prior to construction whether the facility may have a significant environmental effect as defined in section 1.1307 of the rules, 47 C.F.R. § 1.1307.[2] If the proposed facility may have a significant effect on the environment, the applicant must file an Environmental Assessment (EA) and may not commence construction prior to Commission authorization. In addition, we are adopting AT&T's proposal, discussed in ¶ 13 *infra*, that requires licensees and applicants to cease construction, submit an EA and undergo environmental review upon newly discovered information that construction may have a significant impact upon the environment. Finally, we are making certain conforming changes to other sections of our rules and amending section 1.1303, 47 C.F.R. § 1.1303, to make clear that the environmental rules in Part 1 govern over any possibly inconsistent provisions elsewhere in the rules.

BACKGROUND

2. The Commission's environmental rules [3] generally require applicants and licensees to determine whether Commission grants of their applications may significantly affect the environment, and, if so, to submit EAs with their applications.[4] The processing Bureau or the Commission reviews the EA and any information furnished by appropriate governmental agencies and interested persons. The Commission or Bureau then determines whether to continue with further environmental processing (by preparing an Environmental Impact Statement) or to terminate the consideration of environmental issues by making a finding that the proposed facility will have no significant environmental impact.

3. As to facilities for which the Communications Act and our rules do not require Commission authorization prior to construction,[5] section 1.1312 currently provides that any required submission of EAs and any required Commission environmental review take place at the licensing stage rather than prior to construction. Applicants who have already constructed their facilities may subsequently be denied licenses on environmental grounds.[6]

4. The Commission instituted this rule making proceeding to ensure that the Commission fully complies with Federal environmental laws in connection with facilities that do not require pre-construction authorization. The Commission's current rules, which allow construction to proceed without prior environmental review, may result in substantial, irreversible damage to the environment. The Commission therefore proposed to amend its rules to require environmental review before any applicant proceeds with construction.

COMMENTS

5. Comments were filed in this proceeding by the Advisory Council for Historic Preservation (Advisory Council), the National Trust for Historic Preservation (National Trust), American Telephone and Telegraph Company (AT&T), the National Association of Broadcasters (NAB) and the Utilities Telecommunications Council (UTC). The National Trust and the Advisory Council support the proposed amendments. The National Trust states that the "after-the-fact environmental review that occurs now neither makes sense nor carries out federal law".[7] Similarly, the Advisory Council notes that the amendment will "help resolve a major problem in the Commission's compliance with Section 106 of the National Historic Preservation Act and the Council's regulations (36 C.F.R. Part 800), by reducing the potential for licensees and applicants to undertake actions damaging to historic properties without the Commission's review."[8]

6. AT&T also supports the proposed amendments. It states that generally "the proposed rule performs the salutary purpose of assuring that any necessary environmental review will occur prior to licensing."[9] AT&T asserts that, in general, licensees and applicants can readily ascertain which proposals are subject to the Commission's environmental rules. In light of an alleged difficulty in identifying new sites eligible for listing on the National Register of Historic Sites,[10] however, AT&T suggests that a new subsection 1.1312(c) be adopted to require that any construction that does proceed under the new rules will cease upon discovery that there may be a significant environmental effect. Finally, AT&T contends that the proposed language of section 1.1312 --"facilities for which no Commission authorization prior to construction is required" -- is broad enough, and should be construed, to govern non-dominant common carriers' construction of cable transmission lines.

7. NAB suggests three modifications to the Commission's proposal. Specifically, NAB contends that the Commission: a) should not change the categorical exclusion from the environmental rules afforded to broadcast auxiliary facilities in connection with radiofrequency (RF) radiation, *see* 47 C.F.R. § 1.1307(b) Note; b) should not subject to the new rules certain broadcast minor modifications, permissible without prior Commission approval under 47 C.F.R. §§ 73.1690, 74.151 and 74.751; and (c) should address and comprehensively revise its licensing rules to conform to the amended environmental rules. NAB concludes that its "suggested modifications would thwart neither the intent nor the substance of the pro-

posed rules, yet would serve to eliminate potentially significant and unnecessary adverse impact on broadcast licensees."[11]

8. UTC is the only commenter to oppose the proposed amendments.[12] The proposed changes, according to UTC, "could add unnecessary delay to construction or cause the needless expenditure of time and funds in duplicative efforts."[13] With respect to possible delay, it estimates that construction of each new site would be delayed six to 12 months if the new rules were adopted. It views this delay as unwarranted because it believes that no evidence of a problem has been presented.[14] UTC also believes that environmental review more appropriately "lie[s] with the applicant and the city, county, state, or Federal agency, such as the Bureau of Land Management or United States Forest Service, that grants permission for the construction of the site."[15]

DISCUSSION

Necessity for Amendments

9. The Commission agrees with the National Trust, the Advisory Council and AT&T that the proposed amendments to the environmental rules are necessary to ensure that the Commission addresses environmental issues early enough in the licensing process to ensure that it fully meets its obligations under Federal environmental laws.[16]

10. We reject UTC's claim that the rules are "unnecessary." Even if it were true that there have been no instances of irreversible damage to the environment under the current rules, we need not await specific occurrences of irreversible damage before amending our rules to ensure that such damage not occur.[17] In any event, our responsibility under the environmental laws is to consider potential harm to the environment before it occurs, not simply to await environmental damage and then attempt to rectify it.[18] UTC's suggestion that the Commission's environmental rules are merely redundant is also without merit. Federal environmental laws require the Commission, as a licensing agency, to consider independently the effects of its actions on the environment irrespective of requirements that may be imposed by state or local agencies.[19] We note, moreover, that the Commission's environmental rules are designed to reduce or eliminate duplication of effort in the submission of and review of environmental information by this agency and other Federal agencies.[20]

11. We have also carefully considered UTC's claim that the new rule will unnecessarily delay the construction of facilities. The Commission does not believe that the proposed rule amendments will significantly affect construction or that they will have any effect on the vast majority of facilities covered by the rule.[21] Based on our experience, we agree with AT&T that, with the possible exception of eligible historic properties, applicants can generally determine whether a proposed facility may significantly affect the environment.[22] Once an applicant determines that there will be no significant environmental effect it may proceed with construction without any environmental processing. Further, any delay in construction that results from requiring an applicant to undergo environmental processing prior to construction, rather than at the licensing stage, is more than offset by the public interest benefits of ensuring, in compliance with Federal environmental statutes, that no potentially irreversible harm to the environment occurs. Moreover, if, as UTC claims, utilities already proceed with an "abundance of caution in this area" prior to construction, then the rule amendments should not affect utilities in any significant way.[23]

Scope of Amended Rules

12. The Commission proposed that mobile, as opposed to base, stations be exempt from the new section 1.1312, given the likelihood that such stations will not have significant environmental effects. No commenters objected to this exemption, and we adopt it as proposed.

13. We have decided to incorporate AT&T's proposal in revised section 1.1312, *see* 47 C.F.R. § 1.1312(d), which provides that any construction commenced under section 1.1312 must cease, and the environmental processing requirements must be complied with, upon discovery that there may be a significant environmental effect. We believe that this provision will further our efforts to ensure that environmental factors are fully considered and assessed. This provision constitutes a safeguard measure to handle newly, or not readily, discoverable environmental problems. In so adopting this provision, it must be emphasized that it is still incumbent upon licensees and applicants to investigate the environmental status of proposed sites or routes in the first instance.

14. We also have considered AT&T's suggestion that non-radio facilities of non-dominant carriers be covered by the new rule. Our Notice generally contemplated application of the rule to radio facilities, and we did not specifically seek comment on the issue raised by AT&T. Accordingly, we believe it is more appropriate to address the question of environmental processing for common carrier wire and cable facilities in a Further Notice of Proposed Rule Making.

15. With respect to NAB's concern regarding our existing categorical exclusion for broadcast auxiliary facilities, we note that the new rule explicitly does not affect existing categorical exclusions. Broadcast auxiliary stations will thus continue to be categorically excluded from environmental processing requirements insofar as RF radiation is concerned. *See* 47 C.F.R. § 1.1307(b) Note. Such facilities are not generally categorically excluded from our other environmental rules, however, and will continue to be covered if a sensitive site location, as defined in section 1.1307(a), is involved.

16. NAB also objects to inclusion in the revised section 1.1312 of certain minor modifications, currently permitted without prior Commission approval under 47 C.F.R. §§ 73.1690, 74.151 and 74.751. NAB's brief comments, however, do not convince us that such modifications, as a class, could not significantly affect the environment and that they therefore should be given special treatment under the new rule. A transmitter move of 499 feet, for example, could raise issues under the Historic Preservation Act. Similarly, as NAB appears to recognize, an increase in RF radiation above the applicable limit could result from these minor modifications. *See* NAB Comments at 3. Under these circumstances, we believe the record does not support a special exception for these types of modifications. We again emphasize, in response to NAB's concerns, that if a licensee determines that no significant environmental effect will result from its modification, an EA need not be submitted, and prior approval need not be obtained. Thus, to the extent that

only a few of these minor modifications may have significant environmental effects, there will be few instances of delay as a consequence of these rules.

Relationship To Other Rules

17. Although we specifically requested comment on any related rule changes that should be made to ensure consistency between our environmental rules and other portions of our rules, no commenters provided any specific proposed amendments. Nevertheless, as suggested by NAB, we have undertaken a thorough review of the Commission's rules and regulations and are revising various provisions to conform to the requirements, as well as the terminology, of the environmental rules contained in Part 1. In addition, we are adopting the revision to section 1.1303, proposed in the Notice 47 C.F.R. § 1.1303, which provides that our Part 1 environmental rules govern over any other inconsistent provisions of our rules.

CONCLUSION

18. The Commission is amending its environmental rules and making corresponding changes to other parts of its rules to ensure that the Commission fully complies with Federal environmental laws when considering communications facilities for which no pre-construction approval is required by the Communications Act or the Commission's rules.

19. In view of the foregoing and pursuant to sections 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r); section 4332 of the National Environmental Policy Act, 42 U.S.C. § 4332; section 1536 of the Endangered Species Act, 16 U.S.C. § 1536; section 1996 of the American Indian Religious Freedom Act, 42 U.S.C. § 1996 and section 470-f of the National Historic Preservation Act, 16 U.S.C. § 470-f IT IS ORDERED that Parts 1, 5, 21, 22, 63, 78, 80, 87, 90, 95, 97, and 99 of the Commission's Rules are amended as set forth in the Appendix, effective 30 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended: 47 U.S.C. 154, 303, Implement, 5 U.S.C., 552, unless otherwise noted.

2. Section 1.1303 is revised to read as follows:

§ 1.1303 Scope.

The provisions of this subpart shall apply to all Commission actions that may or will have a significant impact on the quality of the human environment. To the extent that other provisions of the Commission's rules and regulations are inconsistent with the subpart, the provisions of this subpart shall govern.

3. Section 1.1312 is revised in its entirety to read as follows:

§ 1.1312 Facilities for which no pre-construction authorization is required.

(a) In the case of facilities for which no Commission authorization prior to construction is required by the Commission's rules and regulations the licensee or applicant shall initially ascertain whether the proposed facility may have a significant environmental impact as defined in § 1.1307, or is categorically excluded from environmental processing under § 1.1306.

(b) If a facility covered by paragraph (a) may have a significant environmental impact, the information required by § 1.1311 shall be submitted by the licensee or applicant and ruled on by the Commission, and environmental processing (if invoked) shall be completed, *see* § 1.1308, prior to the initiation of construction of the facility.

(c) If a facility covered by paragraph (a) is categorically excluded from environmental processing, the licensee or applicant may proceed with construction and operation of the facility in accordance with the applicable licensing rules and procedures.

(d) Paragraphs (a) through (c) of this section shall not apply to the construction of mobile stations.

Part 5 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 5 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply sec. 301, 48 Stat. 1081, as amended, 47 U.S.C. 301.

2. Section 5.51 is amended to add paragraph (c) to read as follows:

§ 5.51 Station Authorization Required.

* * * * *

(c) If installation and/or operation of the equipment may significantly impact the environment, *see* §1.1307, an environmental assessment as defined in §1.1311 must be submitted with the application.

Part 21 of Title 47 of the Code of Federal Regulations is amended as follows.

1. The authority citation for Part 21 continues to read as follows:

AUTHORITY: Secs. 4 and 303, 48 Stat. 1066, 1082, as amended, 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 21.3 is amended to add paragraph (c) to read as follows:

§ 21.3 Station authorization required.

* * * * *

(c) If construction and or operation may have a significant environmental impact as defined by §1.1307 of the Commission's rules, the requisite environmental assessment as prescribed in §1.1311 must be filed with the application and Commission environmental review must be completed before construction of the station is initiated. *See* § 1.1312.

3. Section 21.23 is amended by revising paragraph (c)(4) to read as follows:

Amendment of Applications.

* * * * *

(c) * * *

(4) If the amendment would convert a proposal, such that it may have a significant impact upon the environment under section 1.1307 of the Commission's rules, which would require the submission of an environmental assessment, *see* § 1.1311, and Commission environmental review, *see* §§ 1.1308 and 1.1312.

* * * * *

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 22.1 is amended by revising paragraph (b) to read as follows:

§22.1 Other applicable rule parts.

* * * * *

(b) Part 1 includes rules of practice and procedure for adjudicatory proceedings including hearing proceedings, rule making proceedings, procedures for reconsideration and review of the Commission's actions; and provisions for environmental processing requirements.

* * * * *

2. Section 22.13 is amended by revising paragraph (e) to read as follows:

§22.13 General application requirements.

* * * * *

(e) All applicants are required to indicate at the time their application is filed whether or not a Commission grant of the application may have a significant environmental impact as defined by § 1.1307 of the Commission's rules. If answered affirmatively, the requisite environmental assessment as prescribed in § 1.1311 must be filed with the application and Commission environmental review must be completed prior to construction. *See* § 1.1312.

* * * * *

3. Section 22.20 is amended by revising paragraph (b)(5) to read as follows:

§ 22.20 Defective Applications.

* * * * *

(b) * * *

(5) The application does not include an environmental assessment as required for an action that may have a significant impact upon the environment, as defined in § 1.1307.

* * * * *

4. Section 22.117 is amended by revising paragraph (b)(4) to read as follows:

§ 22.117 Transmitters.

* * * * *

(b) * * *

(4) Commission action would be categorically excluded from the Commission's environmental rules, *see* § 1.1306. If the action is not categorically ex-

cluded, and under § 1.1307 may have a significant environmental impact, the requisite environmental assessment as prescribed in § 1.1311 must be filed and Commission environmental review must be completed prior to the installation of the transmitter.

5. Section 22.913 is amended by revising paragraph (a)(10) to read as follows:

§ 22.913 Content and form of MSA and NECMA applications.

(a) * * *

(10) Where grant of the application may have a significant environmental impact under § 1.1307, the applicant must submit an environmental assessment, *see* § 1.1311, and Commission environmental review must be completed prior to the construction of facilities. *See* § 1.1312

* * * * *

Part 25 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 25 continues to read as follows:

AUTHORITY: Secs. 101-404, 76 Stat. 419-427; 47 U.S.C. 701-744.

2. Section 25.390 is amended by adding paragraph (d)(iii) to read as follows:

§ 25.390 Developmental Operation.

* * * * *

(d) * * *

(iii) The antenna structures proposed to be erected may have a significant effect on the environment *see* § 1.1307, and if so, the requisite environmental assessment defined in § 1.1311, must be filed with the Commission and Commission environmental review must be completed prior to the erection of the structure. *See* § 1.1312.

* * * * *

Part 63 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 63 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended 47 U.S.C. 154. Interpret or apply sec. 214, 48 Stat. 1075, as amended; 47 U.S.C. 214.

2. Section 63.03 is amended by revising paragraph (a)(4) to read as follows:

§ 63.03 Special provisions relating to small projects for supplementing of facilities.

(a) * * *

(4) An action that may have a significant impact upon the environment. *see* § 1.1307.

* * * * *

Part 74 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 74 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply secs. 301, 303, 307, 48 Stat. 1081, 1082, as amended, 1083, as amended; 47 U.S.C. 301, 303, 307.

2. Section 74.112 is amended by adding paragraph (f) to read as follows:

§ 74.112 Supplementary statement with application for construction permit.

* * * * *

(f) That if approval of the experimental broadcast station may have a significant environmental impact, *see* § 1.1307, submission of an environmental assessment, under § 1.1311, and compliance with the Commission's environmental rules contained in Part 1 of this chapter is required.

Part 78 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 78 contains to read as follows:

AUTHORITY; Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 47 U.S.C. 152, 153, 154, 301, 303, 308, 309.

2. Section 78.15 is amended by revising paragraph (c) to read as follows:

§ 78.15 Contents of Applications.

* * * * *

(c) CARS applicants must follow the procedures prescribed in Subpart 1 of Part 1 of this Chapter (§§ 1.1301 through 1.1319) regarding the filing of environmental assessments unless Commission action authorizing construction of a CARS station would be categorically excluded from the environmental processing requirements under §1.1306.

Part 80 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY; Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.3 is amended by revising paragraph (b) to read as follows:

§ 80.3 Other applicable rule parts of this chapter.

* * * * *

(b) *Part 1.* This part includes rules of practice and procedure for license applications, adjudicatory proceedings, procedures for reconsideration and review of the Commission actions; provisions concerning violation notices and forfeiture proceedings; and the environmental processing requirements that, if applicable, must be complied with prior to the initiation of construction.

* * * * *

Part 90 of Title of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 90 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303.

2. Section 90.5 is amended by revising paragraph (b) to read as follows:

§ 90.5 Other Applicable rule parts.

* * * * *

(b) Part 1 includes rules of practice and procedure for adjudicatory proceedings including hearing proceedings, rule making proceedings; procedures for reconsideration and review of the Commission actions; provisions concerning violation notices and forfeiture proceedings; and the environmental processing requirements that, if applicable, must be complied with prior to the initiation of construction.

* * * * *

Part 95 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 95 continues to read as follows:

AUTHORITY; Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 95.43 is revised in its entirety to read as follows:

§ 95.43 Environmental considerations

An application for AMRS system that includes a local station which may have a significant impact upon the environment, as specified in § 1.1307, must be accompanied by an environmental assessment as set forth in § 1.1311.

3. Section 95.81 is removed.

4. Section 95.206 is amended by revising paragraph (b) to read as follows:

§ 95.206 (R/C Rule 6) Are there any special restrictions on the location of my R/C stations?

* * * * *

(b) If your R/C station will be constructed on an environmental sensitive site, or will be operated in such a manner as to raise environmental problems, under § 1.1307, you must provide an environmental assessment, as set forth in § 1.1311, and undergo environmental review § 1.1312, before commencement of construction.

5. Section 95.406 is amended by revising paragraph (b) to read as follows:

§ 95.406 (CB Rule 6) Are there any special restrictions on the location of my CB station?

* * * * *

(b) If your C/B station will be constructed on an environmentally sensitive site, or will be operated in such a manner as to raise environmental problems, under § 1.1307, you must provide an environmental assessment, as set forth in § 1.1311, and undergo the environmental review, § 1.1312, before commencement of construction.

Part 97 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 97 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 303. Interpret or apply, 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 301-609.

2. Section 97.13 is amended by revising paragraph (a) to read as follows:

§ 97.13 Restrictions on station location.

(a) Before placing an amateur station on land of environmental importance or that is significant in American history, architecture or culture, the licensee may be required to take certain actions prescribed by § 1.1301-1.1319 of the FCC Rules.

* * * * *

Part 99 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 99 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609.

2. Section 99.11 is amended by revising paragraph (h) to read as follows:

§ 99.11 Applications

* * * * *

(h) Each applicant in the Safety and Special Radio Services (1) for modification of station license involving a site height or (2) for a license for a new station must, before commencing construction, supply an environmental assessment, where required under §§ 1.1307 and 1.1311, and must follow the procedures prescribed by Subpart 1 Part 1 of this chapter (§§ 1.1307 through 1.1319) before commencement of construction unless Commission action authorizing such application is categorically excluded under § 1.1306.

* * * * *

FOOTNOTES

[1] 3 FCC Rcd 4991, 53 Fed. Reg. 34,558 (1988).

[2] As discussed below, the new section 1.1312 applies to the construction or modification of all radio facilities except mobile stations. The rule does not apply to non-radio facilities of non-dominant carriers that are exempt from the section 214 authorization process, 47 U.S.C. § 214, under section 63.07 of the Rules, 47 C.F.R. § 63.07. We are issuing a Further Notice of Proposed Rule Making in this docket concerning the application of environmental processing requirements to non-radio facilities of non-dominant common carriers. *See* FCC 90-115, adopted March 29, 1990.

[3] *See* 47 C.F.R. §§ 1.1301 - 1.1319.

[4] The Commission's rules provide that those facilities not covered in section 1.1307 are deemed not to have a significant effect on the environment and these facilities are "categorically excluded" from environmental processing. *See* 47 C.F.R. § 1.1306. Sections 1.1307(c) and (d), however, contain safeguards that provide that actions not expressly made subject to environmental processing under section 1.1307 may nevertheless be subject to environmental review where the circumstances so warrant. *See* 47 C.F.R. §§ 1.1307(c) and (d).

[5] *See* 47 U.S.C. § 319(d).

[6] *See Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality*, 60 RR 2d 13, 19-20 (1986).

[7] National Trust Comments at 1.

[8] Advisory Council Comments at 1.

[9] AT&T Comments at 3-4.

[10] *See* 47 C.F.R. § 1.1307(a)(4).

[11] NAB Comments at 2.

[12] UTC did, however, support the Commission's proposal to exempt from the amended rule facilities that are categorically excluded under section 1.1306.

[13] UTC Comments at 1.

[14] In this regard, UTC states:

> The *Notice* provides no evidence of instances in which construction began on stations and irreversible damage occurred. In fact, UTC knows of no situation in which a utility began construction and later was informed by the Commission that its license should not issue because of environmental concerns. Such action on the part of utilities would be foolhardy in light of the unnecessary expense it would entail. Therefore, UTC questions the necessity of initiating this rule making and adopting the proposed amendments. At least with regard to utilities, applicants have heretofore proceeded with an abundance of caution in order to avoid any damage to the human environment and the waste of resources which would occur should construction begin and have to be stopped because a license will not be issued by the Commission.

UTC Comments at 5.

[15] UTC Comments at 6.

[16] *See, e.g.*, National Environmental Policy Act, 42 U.S.C. §§ 4321 - 4395 (NEPA); National Historic Preservation Act, 16 U.S.C. §§ 470 - 470w-6; the Endangered Species Act, 16 U.S.C. § 1536. NEPA requires that federal agencies "to the fullest extent possible" carry out that Act's mandates. 42 U.S.C. § 4332.

[17] We note that claims have been raised that facilities built without prior FCC authorization have resulted in significant harm to the environment. *See, e.g., Bywater Neighborhood Assoc. v. Tricarico*, Civ. No. 88-5086 (E.D. Louisiana) (December 8, 1988), *aff'd* , 879 F.2d 165 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1296 (1990).

[18] *See* note 16, *supra*.

[19] *See, e.g.*, the National Environmental Policy Act, 42 U.S.C. § 4332; the Endangered Species Act, 16 U.S.C. § 1536; the National Historic Preservation Act, 16 U.S.C. § 470f.

[20] *See* 47 C.F.R. § 1.1311(e), which provides in pertinent part:

> An EA need not be submitted to the Commission if another agency of the Federal Government has assumed responsibility for determining whether the facilities in question will have a significant effect on the quality of the human environment and, if it will, for invoking the environmental impact statement process.

See also 47 C.F.R. § 1.1311(d), which provides: "[T]o the extent that such information is submitted in another part of the application, it need not be duplicated in the EA, but adequate cross-reference to such information shall be supplied."

[21] Indeed, UTC itself claims that utilities' proposed communications facilities are generally categorically excluded from environmental review under section 1.1306.

[22] AT&T's Comments at 4. With respect to AT&T's comments that the identification of sites eligible for listing on the National Register of Historic Places (as opposed to those actually listed) is a difficult task, we note that inquiries regarding whether sites are eligible for listing may be made to the appropriate State Historic Preservation Officer. *See* 47 C.F.R. § 1.1307(a)(4) Note. *See also* ¶ 13, *infra*, where we adopt AT&T's proposal regarding newly discovered environmental information concerning construction sites covered by section 1.1312.

[23] UTC Comments at 5.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-387

In the Matter of

Amendment of Environmental Rules;
Amendment of Part 63 of the
Commission's Rules Relating to
Common Carriers

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: March 29, 1990; Released: May 9, 1990

By the Commission:

1. In the *First Report and Order* in this docket,[1] the Commission amended its environmental rules to govern radio facilities for which no pre-construction authorization is required. Under the revised rules, applicants for authorization to operate such facilities must submit any required Environmental Assessments and undergo any required Commission environmental review prior to the commencement of construction, even though Commission approval is not otherwise required prior to construction.

2. In comments filed in response to our original Notice of Proposed Rule Making in this proceeding,[2] American Telephone and Telegraph Company (AT&T) suggested that the revised rules should apply to the wire or cable facilities of non-dominant carriers that are not required to file section 214 applications. [3] AT&T Comments at 5. In the *First Report and Order*, we stated that we desired public comment before so applying the revised section 1.1312. Accordingly, the Commission is issuing this Further Notice of Proposed Rule Making to consider AT&T's proposal,[4] as well as certain related matters.

3. As AT&T noted, under section 63.07 of the Commission's Rules, 47 C.F.R. § 63.07, domestic non-dominant common carriers are not required to file section 214 applications for the construction of any transmission lines. We tentatively agree with AT&T that for purposes of administering the Federal environmental laws, there appears to be no justification for treating these facilities differently from those for which section 214 authorization is required.[5] Accordingly, to ensure that the Commission carries out the mandates of Federal environmental laws[6] and properly considers the environmental consequences of the construction of facilities within its jurisdiction, the Commission is proposing to amend section 63.07 of its rules to provide that domestic non-dominant common carriers covered by 47 C.F.R. § 63.07 are subject to the revised section 1.1312 and to the other relevant provisions of our environmental processing rules, *i.e.*, 47 C.F.R. §§ 1.1301-1.1319.

4. Under the proposed rule amendments, a domestic, non-dominant, facilities-based common carrier would be required to determine prior to construction whether construction of the proposed facility may have a significant environmental impact, as defined in section 1.1307. If a facility may have a significant environmental impact, the carrier must file an Environmental Assessment and may not commence construction prior to conclusion of the Commission's environmental review process.[7] The proposal would be implemented by revising section 63.07 of the Commission's Rules as set forth in the Appendix. We request comment on this proposal.

5. In this context, we note that the installation of additional wire or cable over existing routes was exempted from environmental processing under our original environmental rules, which were adopted in 1974.[8] When we subsequently changed the format of our environmental rules in 1984, we did not codify this exemption expressly.[9] We now are of the tentative view that, as we originally decided in 1974, the installation of additional wire or cable along existing routes will not have a significant effect on the human environment and therefore should be expressly excluded from our environmental processing requirements. The installation of additional wire or cable appears comparable to the construction of additional antennas on existing towers and buildings, which is categorically excluded from environmental processing, *see* section 1.1306 Note 1, and is environmentally preferable to the construction of new towers or routes. We thus request comment on a proposed addition to section 1.1306 (*see* Appendix) to reflect a new categorical exclusion for the installation of additonal wire or cable over existing routes.[10] In connection with this proposal, we have made minor editorial revisions to clarify the existing language of Note 1 to section 1.1306.

6. This Notice of Proposed Rule Making is issued under the authority contained in sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r); section 4332 of the National Environmental Policy Act, 42 U.S.C. § 4332; section 1536 of the Endangered Species Act, 16 U.S.C. § 1536; section 1996 of the American Indian Religious Freedom Act, 42 U.S.C. § 1996 and section 470-f of the National Historic Preservation Act, 16 U.S.C. § 470-f. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **June 18, 1990** and reply comments on or before **July 3, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an originial and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

7. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that ex parte presentations are permitted except during the Sunshine Agenda period. *See* generally section 1.1206(a). The Sunshine Agenda period is the period of time that commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text

of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, ex parte or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

8. In general, an ex parte presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written ex parte presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral ex parte presentation that presents data or arguments not already reflected in that person's previously filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) that summarizes the data and arguments. Each ex parte presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

9. We certify that the Regulatory Flexibility Act of 1980 does not apply to this Rule Making proceeding because if the proposed rule amendments are promulgated there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Carriers providing interstate transmission lines for telecommunications services affected by the proposed rule amendment generally are large corporations or affiliates of such corporations.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 1 and Part 63 of Title 47 of the Code of Federal Regulations are proposed to be amended as follows:

The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

Section 1.1306 is amended by revising Note 1 to read as follows:

§ 1.1306 Actions which are categorically excluded from environmental processing.

* * * * *

Note 1: The provisions of § 1.1307(a) requiring the preparation of EAs do not encompass the mounting of antenna(s) on an existing building or antenna tower unless § 1.1307(a)(4) is applicable. Such antennas are subject to § 1.1307(b) and require EAs if their construction would result in human exposure to radiofrequency radiation in excess of the applicable health and safety guidelines cited in §1.1307(b). The provisions of §§ 1.1307(a) and (b) do not encompass the installation of additional wire or cable over existing routes. The use of existing buildings, towers or routes is an environmentally desirable alternative to the construction of new facilities and is encouraged.

* * * * *

The authority citation for Part 63 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 214, 48 Stat. 1075, as amended; 47 U.S.C. 214.

Section 63.07 is amended by adding a new paragraph (c) to read as follows:

§ 63.07 Special procedures for non-dominant domestic common carriers.

* * * * *

(c) Non-dominant, facilities-based domestic common carriers subject to this section shall not engage in any construction or extension of lines that may have a significant effect on the environment as defined in § 1.1307 without prior compliance with the Commission's environmental rules. *See* § 1.1312.

FOOTNOTES

[1] FCC 90-122, adopted April 6, 1990.

[2] 3 FCC Rcd 5992, 53 Fed. Reg. 34,558 (1988).

[3] *See* 47 U.S.C. § 214; 47 C.F.R. § 63.07.

[4] We also have amended the title of this docket to reflect that the proposed rules will amend Part 63 of the Rules, relating to regulation of common carriers.

[5] In this regard, we note that in adopting section 63.07, the Commission did not address the rule's potential impact on environmental processing. *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor* (CC Docket No. 79-552), *Second Report and Order*, 93 FCC 2d 54 (1982).

[6] *See, e.g.*, National Environmental Policy Act, 42 U.S.C. §§ 4321-4395 (NEPA); National Historic Preservation Act, 16 U.S.C. §§ 470-470w-6; Endangered Species Act, 16 U.S.C. §§ 1531-1543. NEPA requires that federal agencies carry out that Act's mandates "to the fullest extent possible." 42 U.S.C. § 4332.

[7] *See* 47 C.F.R. § 1.1308.

[8] *See Implementation of the Environmental Policy Act of 1969*, 49 FCC 2d 1313, 1319-20 (1974).

[9] *See Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality*, 60 RR 2d 13 (1986).

[10] We note that proposed facilities that are not specifically listed in subsections 1.1307(a) and (b) as being subject to environmental processing may, if circumstances so warrant in a particular case, be subject to the environmental processing rules. *See* 47 C.F.R. §§ 1.1307(c), (d). However, matters described as categorically excluded in the notes to section 1.1306 are not subject to environmental processing unless the Bureau so directs, pursuant to sections 1.1307(c) or (d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-161

In re Applications of

THREET BROADCASTING, INC. (hereafter "Threet")	File No. BPH-880405MB
PEGGY A. HUFFMAN (hereafter "Huffman")	File No. BPH-880406ME
MWK BROADCASTING, INC. (hereafter "MWK")	File No. BPH-880407MI
JACKSON BROADCASTERS LIMITED PARTNERSHIP (hereafter "Partnership")	File No. BPH-880407MO
LANE COLLEGE (hereafter "Lane")	File No. BPED-880407NG

For Construction Permit
for a New FM Station
on Channel 268A (101.5 MHz)
in Jackson, Tennessee

HEARING DESIGNATION ORDER

Adopted: March 8, 1990; Released: May 10, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Threet.* Threet proposes to sidemount its antenna on the existing WJAK (AM) tower. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Threet may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Threet's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must include a detailed study of how the effects of AM Station WJAK were calculated. Accordingly, Threet will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

3. *MWK.* Information before the Commission indicates that MWK was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question MWK's qualifications to be a Commission licensee. Therefore, such issues will be specified and tried against MWK in this proceeding.

4. Item 5(b) of Section II, FCC Form 301 (October 1986) requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application which has been dismissed with prejudice by the Commission." If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. Although MWK answered this item in the affirmative and also noted that

Diane Caudill, one of the ten members of shareholder DECA Investments, was a limited partner in the application (File No. BPH-871203MU) filed by Skyward Broadcasting Limited Partnership to serve Eden Prairie, Minnesota, it failed to timely amend its application to indicate that Skyward Broadcasting's application was dismissed with prejudice by the Commission. *Roxanne Givens*, FCC 89M-2557 (released October 30, 1989). Accordingly, an appropriate issue will be specified below.

5. *Lane*. Section II, Item 4 of FCC Form 340 (May 1985) requires, in pertinent part that noncommercial, educational applicants applying as institutions provide the residence address (number, street, city, state) for all members of the governing board.[1] Lane has not completed Item 4 correctly, providing post office box numbers and/or business addresses for nine of its trustees.[2] Accordingly, Lane must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

6. *Other matters*. Attempts to obtain FAA clearance for Threet's and Partnership's proposed sites through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by each would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. *Other matters*. Threet and MWK have petitioned for leave to amend their application on the dates listed below. The accompanying amendments were filed after June 24, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

Applicant	Dates Filed
Threet	August 30 and November 21, 1988
MWK	November 22 and December 28, 1988 January 9, January 24, June 2, June 13, June 27, September 13 and November 14, 1989

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Threet in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether Sonrise Management Services, Inc. is an undisclosed party to MWK's application.

3. To determine whether MWK's organizational structure is a sham.

4. To determine whether MWK violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report the dismissal of an application with prejudice in which one or more of its shareholders had an ownership interest.

5. To determine, from the evidence adduced pursuant to Issues 2 through 4 above, whether MWK possesses the basic qualifications to be a licensee of the facilities sought herein.

6. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Threet and Partnership would constitute a hazard to air navigation

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That in accordance with paragraph 2 hereinabove, Threet shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

12. IT IS FURTHER ORDERED, That Lane shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 340, to the presiding Administrative Law Judge within 30 days after the release of this Order.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

14. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Threet and MWK ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Although Lane indicates in Section II, Item 1 that it is a nonprofit organization, it also states in Section II, Item 4 that it is governed by a 23-member Board of Trustees.

[2] The nine include James Perkins, Cynthia Bonds, Robert Carter, William Diamond, Dr. Larnie Horton, Robert Huffman, Councilman Gilbert Lindsay, Jacqueline Burton McCollough and Joseph Neal.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-193

In re Applications of

CASCADES BROADCASTING, INC. (hereafter "Cascades")	File No. BPH-870513MA
BROOKLYN RADIO PARTNERS (hereafter "Brooklyn")	File No. BPH-870520MD
GEOLOGICAL TECHNOLOGY, INC. (hereafter "Geological")	File No. BPH-870601MB
RICHARD JAMES TOLLY (hereafter "Tolly")	File No. BPH-870601MC

For Construction Permit
for a New FM Station on Channel
287A, Brooklyn, Michigan

HEARING DESIGNATION ORDER

Adopted: March 15, 1990; Released: May 10, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* A "Motion to Dismiss" Brooklyn's application was filed by Cascades on June 22, 1987. Brooklyn filed a "Reply to Motion to Dismiss Application" on June 25, 1987, and Cascades filed a "Reply to Reply to Motion to Dismiss Application" on July 13, 1987.[1] On July 15, 1987, the Commission released its report finding all applicants acceptable for tender. *See* Report No. 13968.[2] On August 13, 1987, Cascades filed a "Petition for Reconsideration" of this finding, arguing that it was made without considering Cascades' prior arguments. Because the petition incorporates by reference the arguments set forth in the previous pleadings, we will consider the two in tandem.

3. Cascades first charges that Brooklyn's application was filed on an obsolete FCC Form 301 because it was prepared using the April 1985 edition of the form rather than the October 1986 edition which, pursuant to the Commission's March 9, 1987 *Public Notice* (Mimeo 2206), was to be used as of May 1, 1987. Cascades contends that Brooklyn's application should therefore be returned as unacceptable for tender. We disagree. While Cascades is correct in that the application was prepared on the older edition of FCC Form 301, the application is nonetheless "substantially complete" pursuant to Appendix D to the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936, 19945-46 (May 13, 1985), and is therefore acceptable for tender. To return an application merely for use of an older version of the application would be to place form over substance, an action which would not be in the public interest notwithstanding the March 9, 1987 *Public Notice*.

4. Cascades next contends that Brooklyn's Sectional Aero Chart submitted as Exhibit 3 of its application fails to contain a scale of kilometers. Furthermore, the statement in Exhibit 3 that the area within the 60 dbu contour is "625 sq. kilometers" is grossly inaccurate. According to Cascades' engineer, the correct figure should be 1,833 sq. kilometers. Further, Cascades contends that the service contours shown in Brooklyn's application are substantially overstated, with the 60 dbu contour extending as much as 1.5 km beyond the correct distance and the 70 dbu contour extending between 0.5 and 0.6 km beyond the correct distance on all bearings. Again, we disagree. Cascades provides no engineering statement to support these allegations, but merely states that "Cascades' engineer advises . . . " that Brooklyn's service contours are overstated. Cascades simply makes the conclusory assertion that these errors and omissions "clearly render the application unacceptable for tender." Cascades is incorrect. First, the map submitted as Exhibit 3 does indeed contain a scale of kilometers along its bottom. Second, with respect to the coverage area and contours, while Brooklyn has admitted an error in computing its area coverage, Cascades has not demonstrated that the distances to the pertinent coverage contours are in any way inaccurate. Third, even if there is inaccuracy in the coverage area and contours, these deficiencies are clearly not listed in Appendix D to the *Report and Order* in Docket No. 84-750 as tenderability criteria. Therefore, they do not render the application untenderable. Finally, the area and population figures called for in question 10 of Section V-B of FCC Form 301 are used primarily for comparative purposes at hearing. To that extent, any misstatement merely warrants either submission of a corrective amendment or an issue at hearing. [3]

5. Cascades also alleges that an amendment filed by Brooklyn on June 1, 1987, is an attempt to cure the tenderability defects in its application as originally submitted. We find this accusation to be totally without merit. The amendment was filed on the day the Brooklyn window closed. The tenderability of applications is determined at the close of the pertinent filing window under the *Report and Order* in MM Docket No. 84-750; therefore, since the amendment was filed before the window was closed, it was properly considered in the Commission's tenderability study. In sum, we find that Cascades' contentions are without merit. Therefore, its motion to dismiss and petition for reconsideration will herein be denied.

6. *Other Matters.* A preliminary examination of these applications revealed that the entire allocation for Channel 287A at Brooklyn, Michigan is short-spaced to the proposed allocation of Channel 287B1 to Angola, Indiana. This short spacing is the subject of a pending Commission Rule Making proceeding (RM-6138 MM Docket 88-284), which proposes to upgrade the allocation at Angola, Indiana from a Class A to a Class B facility, while changing the allotted Channel for the instant Brooklyn, Michigan

frequency from Channel 287 to to Channel 261. Nonetheless, the applicants for the Brooklyn, Michigan allocation will be allowed to proceed to comparative hearing. However, it shall be ordered that any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of Commission Rule Making in MM Docket 88-284.

7. Cascades petitioned for leave to amend its application on July 7, 1988. The accompanying amendment was filed after August 15, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

8. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Geological have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Geological would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

9. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Geological would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That the "Motion to Dismiss" and the "Petition for Reconsideration" filed by Cascades against Brooklyn ARE HEREBY DENIED, and the July 14, 1987 "Supplement to Motion to Dismiss Application" and "Response to the Supplement to Motion to Dismiss Application" ARE DISMISSED.

13. IT IS FURTHER ORDERED, That any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of the Commission Rule Making in MM Docket No. 88-284.

14. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Cascades IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

15. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Cascades filed a "Supplement to Motion to Dismiss Application" on July 14, 1987 and Brooklyn filed a "Response to the Supplement to Motion to Dismiss Application" on July 14, 1987. We are dismissing these as unauthorized pleadings pursuant to 47 C.F.R. § 1.45(c).

[2] On August 26, 1988, Brooklyn's application was found to be acceptable for filing.

[3] Because Brooklyn actually understated its coverage by some 1200 square kilometers, there is no question of its attempting to gain a comparative advantage at hearing.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-183

In re Applications of

PINEBROOK FOUNDATION, INC. (hereafter "Pinebrook") File No. BPH-880420MF

B & G BROADCASTING LIMITED PARTNERSHIP (hereafter "B & G") File No. BPH-880421ML

FAMILY COMMUNICATIONS LIMITED PARTNERSHIP (hereafter "Family") File No. BPH-880421NP

For Construction Permit for a New FM Station on Channel 222A (92.3 MHz) in Peoria, Illinois

HEARING DESIGNATION ORDER

Adopted: March 15, 1990; Released: May 10, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Pinebrook*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Pinebrook has not completed Item 4 correctly, providing a post office box number as the residence address for Richard T. and Elizabeth P. Crawford. Accordingly, Pinebrook must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

3. Pinebrook proposes to sidemount its antenna on the existing WPEO (AM) tower. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Pinebrook may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Pinebrook's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. In this regard, if the site is presently fenced in compliance with the guidelines, Pinebrook is required to so state and give the distance from the base of the tower to the fence. Accordingly, Pinebrook will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

4. *B & G*. B & G petitioned for leave to amend its application on August 31, 1989. The accompanying amendment was filed after July 25, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

5. *Family*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Family originally filed such a statement, the July 25, 1988 amendment indicates, "N/A-amendment." This response, combined with changes in its organizational structure require that the applicant amend its original statement. Specifically, Family's tendered EEO statement was signed by former general partner Thomas M. Serafin and indicated that Mr. Serafin and current sole general partner Claire Serafin Wiegand would be responsible for implementing the station's EEO program. Since Mr. Serafin is no longer associated with the proposed operations of the station, Family must provide a new certification and indicate the person or position now responsible for implementing the proposed facility's EEO program. Further, Family fails to specify a readily-identifiable minority organization it proposes to utilize for recruitment purposes. Family will therefore be required to amend this portion of its EEO statement.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR

HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Pinebrook in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That Pinebrook shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

9. IT IS FURTHER ORDERED, That in accordance with paragraph 3 hereinabove, Pinebrook shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

10. IT IS FURTHER ORDERED, That the petition for leave to amend filed by B & G IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Family shall submit Section VI information in accordance with paragraph 5 hereinabove to the presiding Administrative Law Judge.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-184

In re Applications of

B & B Broadcasting, Inc. (hereafter "B&B") File No. BPH-880602MV

Usher Broadcasting Co. (hereafter "Usher") File No. BPH-880602NG

For Construction Permit
for a New FM Station on Channel 287A
in East Prairie, Missouri

HEARING DESIGNATION ORDER

Adopted: March 15, 1990; Released: May 10, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Attempts to obtain FAA clearances through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennae proposed by B & B and Usher would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and location proposed by B & B and Usher would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

6. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

State of California
Sacramento, California

File No. 756988
MK-90005

For a waiver of the Rules to allow wideband, omnidirectional operation in the OFS 2.4 GHz band.

WAIVER

Adopted: April 18, 1990; **Released: May 9, 1990**

By the Chief, Land Mobile and Microwave Division:

1. The State of California Justice Department (California) seeks waiver of Sections 94.15(c)(2), 94.65(e), 94.71(b), 94.75(a) and (b), and 94.81(a) of the Commission's Rules, 47 C.F.R. §§ 94.15(c)(2), 94.65(e), 94.71(b), 94.75(a) and (b), and 94.81(a), to permit use of video transmission equipment not type-accepted or type-notified under Part 94 of the Commission's Rules,[1] operation with an emission bandwidth of 16.5 MHz, and use of omnidirectional antennas in the Private Operational Fixed Microwave (OFS) 2450-2483.5 MHz (2.4 GHz) band. Emission bandwidth, in connection with video systems, is generally limited on frequencies below 12.000 MHz to 10 MHz by Section 94.15(c)(2), while it is specifically restricted to 800 kHz in the 2.4 GHz band by Sections 94.65(e) and 94.71(b).[2] Section 94.75(a) requires *inter alia* that OFS stations employ directional antennas meeting the performance standards established by Section 94.75(b). Section 94.81(a) mandates use of equipment that is type-accepted or type-notified under Part 94 of the Commission's Rules. [3]

2. California wishes to operate new temporary-fixed stations employing certain frequencies in the OFS 2.4 GHz band for covert video surveillance. The stations would be used statewide in connection with criminal investigations to provide remote monitoring of targeted rooms/locations from nearby listening posts. California states that it is a tactical requirement that the video equipment and transmitters be easily concealed and quickly installed. The standards of the above-cited rules are inconsistent with these needs, California adds.

3. With respect to the potential for harmful interference, California argues that few licensees exist in the frequency region. Its frequency engineering analysis shows in this regard approximately eight fixed licensees with approximately 25 stations in the area. Further, California contends, its surveillance operations will require relatively low power, low antenna heights and short durations of time. At present California uses frequencies allocated to federal law enforcement agencies with their permission. Increased federal law enforcement activity will eliminate this source of spectrum, California pleads, requiring that it obtain a license in its own name for its purposes.

4. We are persuaded that waiver is appropriate here. California is requesting authorization of temporary-fixed stations that will further law enforcement efforts. Its facilities will operate at relatively low antenna heights and levels of power. Under these circumstances, the potential for harmful interference is not great, and it is clearly outweighed by the public interest benefits to be gained. Furthermore, operation will be on a secondary non-interference basis to all other operations licensed under Part 94.

5. California has shown that unique circumstances exist in this case and that no alternatives are available under our rules. Because the proposed system would not undermine the intent of our rules, which is to minimize the potential for harmful interference and maximize the potential for frequency reuse, we find that waiver would be in the public interest. *See Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

6. Accordingly, pursuant to Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331, and Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3, the request of the State of California for waiver of Sections 94.15(c)(2), 94.65(e), 94.71(b), 94.75(a) and (b), and 94.81(a) of the Commission's Rules IS GRANTED for an indefinite term.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division

FOOTNOTES

[1] The proposed equipment is, however, type-accepted under Part 90, the Land Mobile Radio Service, and the manufacturer is seeking approval under Part 94.

[2] Bandwidths up to 8 MHz are allowed on a case-by-case basis.

[3] California has requested additionally a waiver to operate up to ten transmitters on the requested frequencies throughout the State. Part 94 rules do not limit the number of transmitters operating simultaneously on the assigned frequency under a temporary-fixed microwave authorization. Waiver is therefore unnecessary.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Applications of Bill Goodman and Carter Page d/b/a G and P Partners for Specialized Mobile Radio (SMR) Stations on Frequencies in the 896-901/935-940 MHz Bands	File No. LTR-204
Applications of Metracom Trunked Radio Communications System, Inc. for Specialized Mobile Radio Stations on Frequencies in the 896-901/935-940 MHz Bands	File No. LTR-176

ORDER

Adopted: April 19, 1990; Released: May 10, 1990

By the Commission:

I. INTRODUCTION

1. On June 16, 1989, Metracom Trunked Radio Communications System, Inc. (Metracom) filed an application for review of the Private Radio Bureau's (Bureau) actions dismissing four applications filed by Metracom for Specialized Mobile Radio (SMR) stations on frequencies in the 896-901/935-940 MHz (900 MHz) bands and denying Metracom's petition for reconsideration on the dismissal of its applications. Metracom contends that the dismissal of its applications is contrary to the Commission's Rules, to the *Report and Order*, Amendment of Part 90, Subparts M and S of the Commission's Rules (*M and S Report and Order*), [1] and to the *Order*, Amendment of Section 90.611(d) of the Commission's Rules Governing the Application Processing Procedures for the 900 MHz Band for Private Land Mobile Radio Use (*NABER Order*). [2]

2. Similarly, on August 30, 1989, Bill Goodman and Carter Page d/b/a G and P Partners (G and P) filed a petition for reconsideration of the Bureau's action dismissing twenty-one applications filed by G and P for SMR stations on frequencies in the 900 MHz bands. G and P contends that the dismissal of its applications is inconsistent with the Commission's current rules and decisions, specifically the *M and S Report and Order* and the *NABER Order*, and is not in the public interest.

3. Because the two pleadings address the same issues and rely on the same precedent, we will consider both in one proceeding. For the reasons discussed below, we deny Metracom's application for review and G and P's petition for reconsideration.

II. BACKGROUND

4. In our *Report and Order*, General Docket No. 84-1233, [3] we allocated ten megahertz of the 900 MHz reserve band to the private land mobile radio services. Of that ten megahertz, we apportioned five megahertz of the 900 MHz band to the SMR pool. Although the allocation was nationwide, we directed that applications would be accepted initially only in 50 designated urban centers. A subsequent Public Notice on November 4, 1986,[4] delineated the area surrounding the 50 designated urban centers for which applications would be accepted for SMR stations. The area for initial licensing was defined as the area within a 100-mile radius of the geographic center of each of the 50 urban centers. The application processing for these areas was divided into a two phase process. In the first phase of processing, we accepted applications for stations that would be constructed in Designated Filing Areas (DFA).[5] In the second phase of processing, applications would be accepted for stations to be located within the 100-mile radius of any one of the designated 50 urban centers. Filing windows were set in which an applicant wishing to apply for a certain DFA had to file. The Public Notice stated that applications submitted either prior to or after the filing window dates would be dismissed. The Public Notice also indicated that the procedures for further application filings would be delineated in a further public notice. No further public notice accepting further 900 MHz SMR applications has been issued.[6]

5. The *M and S Report and Order*, among other things, amended Section 90.611 of the Rules[7] to provide procedures for waiting lists for 800 MHz and 900 MHz SMR applications. Separate waiting lists were provided for in each band.[8] In addition, the *M and S Report and Order* indicated that no waiting lists for the 900 MHz SMR channels would be established until after additional 900 MHz applications were accepted, directing the reader's attention to the Public Notice of November 4, 1986.[9]

6. In December of 1988, the Private Radio Bureau dismissed a Petition for Rule Making submitted by the National Association of Business and Educational Radio, Inc. (NABER) requesting that we grant a preference to 800 MHz trunked SMR systems seeking a 900 MHz SMR system in the same geographic area.[10] That Order discusses the scope of Section 90.611(d) of the Rules[11] as background to our discussion dismissing NABER's petition.[12]

7. On February 14, 1989, Metracom filed four applications for 900 MHz SMR stations in various DFAs.[13] On March 27, 1989,[14] the Bureau dismissed these applications because, according to the procedures established by the Public Notice of November 4, 1986,[15] we are not accepting new applications for 900 MHz SMR stations at this time. On April 10, 1989, Metracom resubmitted the applications and requested the Bureau to reconsider its action in dismissing the four applications. On May 18, 1989, the Bureau denied Metracom's petition for reconsideration and again dismissed the four applications.[16] On June 16, 1989, Metracom filed the subject application for review of the dismissal of its four applications.

8. On June 19, 1989, G and P filed twenty-one applications for 900 MHz SMR stations in various DFAs.[17] On July 31, 1989, the Bureau dismissed these applications because, according to the procedures established by the Public Notice of November 4, 1986, we are not accepting

new applications for 900 MHz SMR stations at this time.[18] On August 30, 1989, G and P filed a petition for reconsideration of the dismissal of its twenty-one applications.

III. APPLICATION FOR REVIEW/PETITION FOR RECONSIDERATION

9. Metracom contends that the Public Notice is no longer applicable because it asserts that the Public Notice deals solely with initial licensing of 900 MHz SMR systems. According to Metracom, the applicable rules and decisions are Section 90.611 of the Commission's Rules.[19] the *M and S Report and Order*, and the *NABER Order* dismissing NABER's petition. Metracom concludes that the Bureau erred in dismissing Metracom's applications because none of the aforesaid rules and decisions imposed a "freeze" on acceptance of new applications for 900 MHz SMR systems within the DFAs. Consequently, it requests that its applications be granted, if possible, or be placed on a 900 MHz waiting list.

10. G and P, in its petition, states that the Public Notice of November 4, 1986, describes only the initial procedure to be employed for the acceptance of Phase I applications and does not describe any procedure for the handling of applications for areas within the DFA's following the initial award of licenses to lottery winners. According to G and P, the *M and S Report and Order* and the *NABER Order* dismissing NABER's petition supports its contention that we must accept applications for 900 MHz SMR channels and initiate a waiting list if the applications cannot be granted. Finally, G and P represents that the acceptance of the applications would be in the public interest because G and P intends to construct in the areas that we have indicated are in greatest need of additional spectrum. Accordingly, G and P requests that we grant the petition for reconsideration and accept the twenty-one applications. If any of the applications cannot be granted because of unavailability of frequencies in the specified area, it requests that a waiting list be established for that area.

IV. DISCUSSION

11. Contrary to the contentions of Metracom and G and P, the *Public Notice* is still applicable and governs the resolution of this matter. As explained in paragraph 4, *supra*, the *Public Notice* opened specific filing windows during which applications for facilities to be located within the DFAs had to be filed. The *Public Notice* clearly stated that applications filed after the filing windows closed would be dismissed and acceptance of further applications for the 50 urban centers, including the DFAs, would be announced in a further public notice.[20] No such public notice has been issued and no other action has been taken by either the Bureau or this Commission to provide for the acceptance of applications such as Metracom's and G and P's.

12. G and P and Metracom improperly cite to the *M and S Report and Order* and the *NABER Order* in support of their contentions that their applications should be accepted. While the Bureau did state in the *NABER Order* that "900 MHz waiting lists are established," in context, the *NABER Order* makes clear that the purpose of this statement was merely to inform the public that there would not be a single waiting list for both 800 MHz and 900 MHz SMR applicants. The *NABER Order* cited, by reference, to the section of the *Public Notice* stating that procedures for future applications would be announced in a further notice. *NABER Order* at n. 2. Similarly, the *M and S Report and Order* cited to the same section of the *Public Notice*. *M and S Report and Order* at n. 53. Read in tandem, these cases are consistent with the *Public Notice* and do not supersede it. Regardless of any possible confusion, we note that the Bureau's action in dismissing the applications in no way prejudiced the applicants. Since, as stated above, there is in fact no waiting list, no other parties have preference over Metracom or GandP for constructing 900 MHz SMR facilities within the 50 urban centers at this time. We direct the attention of the applicants to the *900 MHz Phase II* proceeding, where such issues are currently under consideration.[21] The Bureau therefore correctly dismissed Metracom's and G and P's applications pursuant to the terms of the Public Notice of November 4, 1986.

V. CONCLUSION

13. IT IS HEREBY ORDERED that Metracom's application for review and G and P's petition for reconsideration ARE DENIED and the dismissal of Metracom's four 900 MHz SMR applications and the dismissal of G and P's twenty-one 900 MHz SMR applications ARE AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 3 FCC Rcd 1838 (1988).

[2] 4 FCC Rcd 511 (Private Radio Bureau, 1989).

[3] Report and Order, Amendment of Parts 2, 15, and 90 of the Commission's Rules and Regulations to Allocate Frequencies in the 900 MHz Reserve Band for Private Land Mobile Use, 2 FCC Rcd 1825 (1986).

[4] Public Notice, Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, 1 FCC Rcd 543 (1986).

[5] A Designated Filing Area generally includes the counties comprising each of the top 50 urban center's Metropolitan Statistical Area as defined by the Census Bureau.

[6] We have, however, initiated a rule making concerning the second phase of licensing. Notice of Proposed Rule Making, Amendments to Parts 2 and 90 of the Commission's Rules (*900 MHz Phase II*), FCC 89-328, adopted November 28, 1989, 55 FR 744 (January 9, 1990).

[7] 47 C.F.R. § 90.611.

[8] M and S Report and Order, 3 FCC Rcd 1838 at paras. 48-49 & n. 53.

[9] *Id.* at n. 53.

[10] Order, DA 88-2040, 4 FCC Rcd 511 (1989).

[11] 47 C.F.R. § 90.611(d).

[12] Footnote 2, paragraph 2 of *NABER Order*, refers the reader to footnote 53 of the M and S Report and Order. Footnote 53 indicates our intent that the application procedures established by the Public Notice of November 4, 1986, were unaffected by the proceedings of PR Docket No. 86-404.

[13] FCC File Nos. 649039-649042.

[14] Letter from T. Fishel to Metracom (March 27, 1989).

[15] Note 4, *supra*.

[16] Letter from T. Fishel to George Petrutsas (May 18, 1989).

[17] FCC File Nos. 661122-661142.

[18] Letter from T. Fishel to G and P Partners (July 31, 1989).

[19] 47 C.F.R. § 90.611.

[20] Specifically, we stated: "Waiting lists for the 900 MHz channels will be established, if necessary, after the Commission begins to accept additional 900 MHz applications. *See*, Public Notice, 1 FCC Rcd 543 (1986)." In that Public Notice, we stated: "During Phase II, which will occur after the processing and granting of applications for facilities in the DFAs, applications will be accepted for SMR facilities located within a 100-mile radius of the urban center of each of the top 50 MSAs. Procedures for this second phase filing will be stated in a future Public Notice."

[21] Note 6, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PALMER COMMUNICATIONS INCORPORATED — File No. 01213-CL-MP-88

For major modification
of facilities for DPCRTS
Station KNKA598
Fort Myers, Florida

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1990; Released: May 9, 1990

By the Chief, Mobile Services Division:

1. On May 11, 1988, Palmer Communications Incorporated (Palmer) filed an application to modify its nonwireline cellular system serving the Fort Myers, Florida Metropolitan Statistical Area (MSA) by adding two additional cell sites. P&T Communications (P&T) filed a petition to dismiss or deny the captioned application. Palmer has filed an opposition pleading to which P&T has filed a reply. In addition, Palmer has amended its application to include further information demonstrating its ability to finance the proposed modifications.

I. BACKGROUND

2. This proceeding involves an application filed in August 1987 by Robert J. Kile (Kile) to assign its cellular radio license for Domestic Public Cellular Radio Telecommunications Service (DPCRTS) Station KNKA598 to Palmer.[1] P&T, an entity holding a minority interest in that station license filed a petition to dismiss or deny the assignment application. On March 8, 1988, the Mobile Services Division (MSD) denied P&T's petition to deny and granted the application assignment. *Robert J. Kile*, 3 FCC Rcd 1087 (Mob. Serv. Div. 1988) (*MSD Order*). In that Order, the MSD found, among other things, that Palmer had complied with the financial qualification requirements of Section 22.917 of the Commission's Rules.

3. On application for review, the Commission affirmed the *MSD Order* (*Review Order*). [2] In its decision, the Commission stated that the standard for showing financial ability applicable to an application to assign or transfer a license is one of reasonable assurance that the funds will be available to acquire the facility, citing *CNCA Acquisition Corporation*, 3 FCC Rcd 6088 (1988). [3] In this regard, it found that Palmer had obtained a financial commitment letter from the Bank of New York which demonstrated a reasonable assurance that a loan of $10 million would be available to acquire the Fort Myers facility. In addition, the Commission pointed out that while the transferee of an operating system is not required to show the ability to operate the system, Palmer's loan commitment would provide Palmer with funds for working capital well in excess of the $5.1 million purchase price of the facility and would also be sufficient to cover the estimated cost of $861,270 needed to operate the system for one year.[4]

II. CONTENTIONS

4. In the instant proceeding, P&T alleges that Palmer's application to modify its cellular system fails to comply with the financial requirements of Section 22.917 of the Rules. According to P&T, Section 22.917(b)(2) requires applicants for modified facilities to include estimated costs of construction or operation, balance sheets, income statements, statements of projected revenue and expenses and statements of projected sources and applications of funds. It contends that Palmer's failure to supply the information required by Section 22.917 renders the application defective. In addition, P&T contends that Palmer's application violates Sections 1.65 and 22.13(a)(5) of the Rules by failing to include the proposed cost of construction.[5]

5. In opposition, Palmer asserts that its qualifications to operate the Fort Myers facility are a matter of record before the Commission. Palmer notes that in its application to acquire the Fort Myers facility, it provided a reasonable assurance that it could obtain financing of $10 million, an amount that is more than $2 million in excess of the costs of acquiring and operating the system for a year. It asserts that this $2 million cushion is a sufficient amount to cover the cost of modifying its cellular system as proposed in its application. Finally, with respect to P&T's claim that its application fails to specify the proposed cost of construction, it submits the declaration of Leon Henson, the general manager of the Fort Myers system, who estimates that the cost of implementing the proposed modification as well as the costs for operating the new cell sites for one year will total $711,500. Palmer concludes that since the proposed modifications costs are well within the $2 million cushion noted in its assignment application, P&T's arguments concerning its financial ability to make the modifications proposed in the above-referenced application are without merit.

6. In reply, P&T acknowledges that Palmer has supplied the costs of construction and operation as P&T requested. Nevertheless, it contends that Palmer's reliance on the $2 million cushion that exists from the funds available to acquire the Fort Myers system violates Section 22.917(a)(2) of the Rules.[6]

III. DISCUSSION

7. Section 22.917(b)(2) states that "[a]pplications for modified facilities in markets beyond the top-120 shall demonstrate the applicant's financial ability in accordance with the requirements of paragraph (a) . . . ." Section 22.917(a)(1)(ii) provides that "[a]pplications for . . . modified facilities shall demonstrate the applicant's financial ability to meet the realistic and prudent . . . [e]stimated operating expenses for a period of one year, depending upon the nature of service proposed and the degree of business . . . risk." Thus, P&T is correct that the rules require that an applicant provide a showing of ability to finance the new construction and first year operating expenses. Here, Palmer has amended its application with

a financial showing consistent with Section 22.917(a)(1).[7] Accordingly, we find that Palmer's application meets the Commission's financial showing requirements.[8]

8. We find that Palmer is fully qualified to effectuate the proposals in the instant application and that granting its application will serve the public interest, convenience and necessity.

9. Accordingly, IT IS ORDERED, That the application (File No. 01213-CL-MP-88) filed by Palmer Communications Incorporated IS GRANTED.

10. IT IS FURTHER ORDERED, That the petition to dismiss and deny filed by P&T Communications IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Kile's initial application for a construction permit was granted on January 28, 1987. *Robert J. Kile*, 2 FCC Rcd 583 (Mob. Serv. Div. 1987).

[2] *Robert L. Kile*, 5 FCC Rcd 513 (1990).

[3] The Commission pointed out that the requirement that an applicant demonstrate its ability to operate the proposed system one year after the transfer refers only to unbuilt facilities and not to operational facilities, such as the Fort Myers facility. Therefore, it found that the MSD has correctly applied the financial requirements of Section 22.917 of the Rules.

[4] On July 14, 1988, P&T filed the instant petition to deny Palmer's above-captioned application to modify the Fort Myers facility and also a motion to consolidate the instant proceeding with the proceeding to assign Station KNKA598. In the *Review Order*, the Commission denied P&T's request, finding that the consolidation of these proceedings would not be in the public interest.

[5] P&T also asserts that the Commission should condition any action on the above-referenced application on the outcome of its pending application for review of the *MSD Order*. However, in view of the Commission's decision in the *Review Order* to uphold the *MSD Order* granting the assignment, this issue is moot.

[6] Section 22.917(a)(2) states that, "[r]esources used to demonstrate an applicant's financial ability under paragraph (a)(1) of this section cannot include funds committed to another project, or committed in another cellular application."

[7] Therefore, we reject P&T's argument that Palmer's proposal to modify its facility relies on funds committed to another project or cellular application, in violation of Section 22.917(a)(2).

[8] We note that in *Amendment of Part 22 of the Commission's Rules (Unserved Areas), Notice of Proposed Rule Making*, CC Docket No. 90-6, FCC 90-14 (released February 6, 1990), the Commission proposed to amend Section 22.917(a)(1) and (b)(2) to eliminate the requirement that financial showings be filed by applicants who are modifying existing facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-171

In re Applications of

LINA M. PARISH (hereafter "Parish") File No. BPH-880505MB

GRACEVILLE PANHANDLE BROADCASTING, LTD. (hereafter "Panhandle") File No. BPH-880505NP

For Construction Permit for a New FM Station in Graceville, Florida Channel 271A (102.1 MHz)

HEARING DESIGNATION ORDER

Adopted: March 13, 1990; Released: May 10, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. A preliminary examination of these applications revealed that the entire allocation for Channel 271A at Graceville, Florida, is short spaced to the proposed co-channel allotment of Channel 271C3 at Santa Rosa, Florida. This short spacing is the subject of the Commission's pending Rule Making MM Docket No. 90-129, which proposes to upgrade the allotment at Santa Rosa from a Class A to a Class C3 facility, while changing the alloted channel for the instant Graceville allotment from Channel 271A to Channel 269A. Nonetheless, the applicants for the Graceville allotment will be allowed to proceed to comparative hearing. However, it shall be ordered that any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of Commission Rule Making MM Docket No. 90-129.

3. *Panhandle*. Panhandle petitioned for leave to amend its application on October 20, 1988, and March 3, March 7, May 19, and June 27, 1989. The accompanying amendments were filed after August 15, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of Commission Rule Making MM Docket No. 90-129.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Panhandle ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-168

In re Applications of

LT/COLONEL CYRUS V. EDWARDS (hereafter "Edwards")	BPH-851024MB
LENN R. PRUITT & GEORGE E. OWEN, JR. (hereafter "Pruitt/Owen")	BPH-851025MF
BOTT COMMUNICATIONS, INC. (hereafter "Bott")	BPH-851028MG
JAMES E. MILLER (hereafter "Miller")	BPH-851028MH [Dismissed Previously]

For Construction Permit for
New FM Station, Channel 236C; 95.1 MHz
Shawnee, Oklahoma

HEARING DESIGNATION ORDER

Adopted: March 13, 1990; Released: May 10, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters*. On June 14, 1988, the Chief, FM Branch returned Miller's application as inadvertently accepted for tender because the legal boundaries of the community of license were not clearly and legibly defined on the contour map as required by Item 4g of Appendix D to the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985). On July 5, 1988, Miller filed a petition for reconsideration of the action of the Chief, FM Branch.

3. To properly lie, a petition for reconsideration of untenderability and a request for *nunc pro tunc* reinstatement must demonstrate that such finding concerning the application, as originally filed, was erroneous. *See* the *Report and Order*, *supra*, and 47 C.F.R. § 1.106(d)(2). Miller believes that the staff "overlooked Exhibit No. 1" of his application, and appended another copy of this exhibit, filed with the original application, to his petition. However, the staff did not "overlook" Exhibit No. 1, which consists of an aeronautical chart on which the service contours of Miller's proposal are displayed. Miller contends that his "technical consultant has clearly drawn the legal boundaries of the community of license" on this chart. However, what Miller alleges to be the legal boundaries of the community of Shawnee are, in actuality, the particular map symbol for the alignment of the runways at the Shawnee airport. This symbol falls short of defining the legal boundaries of the community of Shawnee. It is not even possible for Commission staff to determine if the community is located at the coordinates indicated by the symbol. Accordingly, there was no error in the action of the Chief, FM Branch which returned Miller's application. Therefore, reconsideration is not warranted and the instant petition will be denied.[1]

4. *Edwards*. As originally filed, Edwards' application failed to comply with the spacing requirements established in the *Report and Order* in Docket 84-508, 50 Fed. Reg. 34465 (August 26, 1985), which allocated Channel 236C to Shawnee, Oklahoma. The *Report and Order*, *supra*, specified a site restriction of approximately 31.4 miles southeast of Shawnee in order to prevent short spacing to KICT(FM), Channel 236, Wichita, Kansas; KEBC(FM), Channel 234, Oklahoma City, Oklahoma; and KMGZ(FM), Channel 237A, Lawton, Oklahoma. As originally filed, Edwards' application specified a site which was short-spaced to all three of these stations. On June 2, 1986, Edwards amended his application to specify a fully-spaced site. Furthermore, on March 26, 1987, Edwards filed a petition to amend the engineering portion of his application[2].

5. The *Report and Order* in MM Docket 84-750, *supra*, provided that an applicant could not file an amendment to its application more than 30 days after the placement of the application on a public notice of tenderability. In *Memorandum Opinion and Order*, reconsideration in MM Docket 84-750, 50 Fed. Reg. 43157 (1985), the Commission provided that, within a group of mutually exclusive applicants, if an applicant is placed on public notice of tenderability, all applicants mutually exclusive with that application will be afforded an opportunity to file amendments during the 30-day period following publication of the public notice. The last public notice of tenderability in this proceeding was issued on June 15, 1987. Accordingly, Edwards' June 2, 1986 and March 26, 1987 engineering amendments are timely filed.

6. On July 8, 1987, August 3, 1987, August 11, 1987, September 24, 1987 and October 16, 1987, Edwards provided the Commission with a copy of his correspondence with Mr. Ken Fleischfresser of the Federal Aviation Administration. These letters indicate that Edwards' June 2, 1986 site, as amended on March 26 1987, has been disapproved by the FAA and that he has subsequently located yet a third site which he believes will be acceptable to that agency. However, Edwards has failed to officially amend his application to specify this newly proposed site by filing Sections V-B and V-G of FCC Form 301. Edwards has also failed to demonstrate that he has reasonable assurance of the proposed site's availability, as required by the *Report and Order* in MM Docket 84-750, *supra*, and has failed to apprise the Commission of whether or not the FAA has approved this third site. Accordingly, site availability and air hazard issues will be specified with respect to Edwards' application.

7. On November 23, 1987, Edwards filed a "petition" to change the format of his business entity of his proposed station from a sole proprietorship to a corporation. However, Edwards has failed to supply the requisite information regarding corporate ownership as required by

Sections I and II of FCC Form 301. Specifically, Section II, page 2 of FCC Form 301 requires an applicant to provide a list of all officers, directors, stockholders and partners with an attributable interest in the applicant. This information is necessary so that the Commission and other applicants can fully and fairly evaluate the ownership of the applicant. Since the requisite information is lacking from Edwards' amendment, he will be required to provide it to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. On November 23, 1987, Edwards filed an engineering amendment proposing to make changes in his antenna and "coverage survey". On November 24, 1987, Edwards filed an ascertainment of community needs. Edwards has failed to demonstrate good cause for acceptance of these late-filed amendments and they will be returned as unacceptable pursuant to 47 C.F.R. § 73.3522(a)(2).

9. On August 11, 1988, Pruitt/Owen filed a petition to dismiss the application of Edwards. However, the *Report and Order* in MM Docket 84-750, *supra*, established that a petition to deny an application must be filed within 30 days of the application appearing on a Notice of Acceptance. Edwards' application appeared on such a notice on October 26, 1987. Therefore, Pruitt/Owen's late-filed pleading will be treated as an informal objection pursuant to 47 C.F.R. § 73.3587.

10. Pruitt/Owen alleges that Edwards' application, as originally filed, was untenderable since the transmitter site map does not reflect legal boundaries of the community of Shawnee as required by FCC Form 301 Section V-B, Item 10(c) and by Appendix D of the *Report and Order*, *supra*. However, staff review indicates that Edwards' depiction of Shawnee is of sufficient clarity and legibility to determine the proposed community of license. Furthermore, from the submitted maps the staff is able to establish compliance with the requirement that Edwards' 3.16 mV/m contour cover at least 80% of the community of license. [3] *See* 47 C.F.R. § 73.315(a). Since Edwards' application is not in violation of either the community of license identification requirement or the contour coverage rule, Pruitt/Owen's objection will be denied.

11. *Pruitt/Owen*. On June 10, 1988, the Chief FM Branch returned the application of Pruitt/Owen as inadvertently accepted for tender for failure to include a contour map which showed the boundaries of the community of Shawnee as required by Appendix D of the *Report and Order*, *supra*. On June 23, 1988, Pruitt/Owen filed a petition for reconsideration of this action to which Edwards has filed, on July 6, 1988, a "petition to deny", and Pruitt/Owen a response. On August 5, 1988, the Chief, FM Branch granted Pruitt/Owen's petition for reconsideration and reinstated the application *nunc pro tunc*. On August 5, 1988, Edwards changed the title of his petition to deny to an opposition and, in the same document, filed an unauthorized appendix to this document. However, Pruitt/Owen's application appeared on a Notice of Acceptance on October 26, 1987. Therefore, pursuant to 47 C.F.R. § 73.3584(a), the last date for filing petitions to deny were due within 30 days of the release of this document. Edwards' pleadings are, thus, untimely. Furthermore, the allegations raised within the petition do not concern Pruitt/Owen's petition for reconsideration. Consequently, Edwards' pleadings are essentially petitions to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcast Applications; Amendments of Part 1 of the Commission's Rules* 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters raised in Edwards' petition have not been considered. Accordingly, an opportunity to raise any allegations therein will be afforded Edwards post-designation pursuant to 47 C.F.R. § 1.229.[4]

12. *Other Matters*. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Edwards	8/3/87; 8/11/87; 9/24/87; 11/23/87
Pruitt/Owen	10/20/87; 8/30/88; 12/15/89
Bott	9/11/87; 10/27/87; 1/14/88; 3/1/88; 3/14/88 (engineering); 4/28/88 (engineering)

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

14. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

15. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Edwards has reasonable assurance that the transmitter site specified will be available to him.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: Edwards.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

16. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Miller IS DENIED.

17. IT IS FURTHER ORDERED, That the petition to deny filed by Edwards against Miller's application IS DISMISSED AS MOOT.

18. IT IS FURTHER ORDERED, That Edwards file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order containing the information required by Section I and II of FCC Form 301 regarding his change in ownership from an individual to a corporation.

19. IT IS FURTHER ORDERED, That Edwards' November 23, 1987 engineering amendment, his November 23, 1987 "coverage survey" and his November 24, 1987 ascertainment of community needs ARE RETURNED.

20. IT IS FURTHER ORDERED, That Pruitt/Owen's informal objection to Edwards' application IS DENIED.

21. IT IS FURTHER ORDERED, That both Edwards' July 6, 1988 petition to deny and his August 5, 1988 opposition to Pruitt/Owen's petition for reconsideration ARE DISMISSED.

22. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Edwards (8/3/87; 8/11/87; 9/24/87; 11/23/87); Pruitt/Owen (10/20/87; 8/30/88; 12/15/89); Bott (9/11/87; 10/27/87; 1/14/88; 3/1/88; 3/14/88 (engineering); 4/28/88 (engineering)).

23. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

24. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

25. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] On August 8, 1986, Edwards had filed a petition to deny Miller's application alleging, *inter alia*, that (1) no profile maps showing the eight radials required by 47 C.F.R. § 73.312 were submitted; (2) no index chart of the USGS maps used was included; (3) Miller's HAAT, as shown, is inaccurate; and (4) the application fails to include a showing as to the blanket area. Miller has filed an opposition and Edwards a reply. In light of the action taken herein, Edwards' petition will be dismissed as moot.

[2] Edwards also submitted an addendum to this amendment on April 8, 1987.

[3] *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT).

[4] Pursuant to 47 C.F.R. §§ 73.3584, and 1.45, a pleading cycle is established in the following manner. Any party in interest may file a petition to deny any application, as originally filed, or as amended so as to require a new file number. Petitions to deny must be filed within 30 days after issuance of a public notice of acceptance for filing of the application. The applicant may file an opposition within 10 days after the petition is filed and the applicant may file a reply within 5 days. *No other pleadings may be filed unless requested or authorized by the Commission. See* 47 C.F.R. § 1.45(c). Nevertheless, both Edwards and Pruitt/Owen have demonstrated a complete disregard for the Commission's established pleading cycle as set forth above. This has resulted in the filing of numerous unauthorized pleadings which will not be considered herein. These unauthorized filings have caused considerable delay and resulted in needless additional time spent by the staff in producing this Hearing Designation Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application for Review of the
Dismissal of an Indecency Complaint
Against King Broadcasting Co.,
Licensee, KING-TV, Seattle, WA

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 1990; Released: May 10, 1990

By the Commission:

1. The Commission has before it for consideration an Application for Review of the Mass Media Bureau's dismissal of an indecency complaint against television station KING-TV, Seattle, WA, released April 7, 1988.[1]

2. On October 19, 1987, the Commission received a complaint alleging that KING-TV's broadcast of the program "Teen Sex, What About the Kids?" at 9:00 p.m. on June 3, 1987, contained "objectionable" and "offensive" material. In response, the Mass Media Bureau conducted a thorough review of the complaint and supporting material, including a tape of the program.[2] The Bureau determined that the material in question was not indecent as defined by the Commission [3] and, accordingly, dismissed the complaint by letter dated April 7, 1988. In reply to the dismissal letter, the complainants requested "a full FCC review of the broadcast" on the basis that the program should be judged "obscene" under the three prong test for obscenity found in *Miller v. California*, 413 U.S. 15 (1973).

3. As an initial matter, the argument that the material is "obscene" is a new issue raised for the first time in the Application for Review. Pursuant to Section 1.115(c) of the Commission's Rules, such an argument cannot form the basis for an Application for Review.[4] With respect to the complainants' objection to the Bureau's conclusion that the material in question did not constitute actionable indecency, a review of the broadcast reveals that the Bureau's determination was correct. Although the program dealt with sexual issues, the material presented was clinical or instructional in nature and not presented in a pandering, titillating or vulgar manner or in any way that we would consider patently offensive. Commission precedent clearly holds that sexual subject matter does not necessarily render material indecent; rather, such material is only actionable where presented in a patently offensive manner. We further note that this case involved a broadcast aired between 9:00 p.m. and 10:00 p.m. Currently, the Commission has authority to restrict the broadcast of indecent material when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). The court also has stayed the effectiveness of the Commission rule implementing a congressional directive that would have banned indecent broadcasts 24 hours a day. *Action for Children's Television v. FCC*, No. 88-1916 (D.C. Cir. Sept. 13, 1989) ("Act II").[5] For these reasons, the Commission recently concluded that it was forced to vacate a pending action against a station's broadcast of apparently indecent material at 8:00 p.m. *See Order Vacating Proceeding (KZKC (TV))*, 4 FCC Rcd 6706 (1989). Based on the foregoing, we find no reason to disturb the staff's dismissal of the complaint.

4. Accordingly, IT IS ORDERED that, pursuant to Section 1.115(g) of the Commission's Rules, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Although the Application for Review was filed two days late, on May 11, 1988, we will, on our own motion, waive the time limit contained in Section 1.115(d) of the Commission's Rules and consider the Application on the merits. *See In the Matter of Liability of High Country Broadcasting Corporation*, 4 FCC Rcd 1528 (1989).

[2] "Teen Sex, What About the Kids?" was apparently part of a series of programs dealing with problems facing teenagers. It discussed the extent to which sex education is, and should be, taught in the classroom. Segments were filmed in a classroom at Interlake High School in Seattle, and focused on one teacher's explicit method of teaching sex education. The program included candid discussions of sexual topics such as teen pregnancy and sexually transmitted diseases, and used sex organ models to simulate the use of various birth control devices, *i.e.*, prophylactics and diaphrams.

[3] The Commission defines indecency as material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. Subject matter alone does not render material indecent. *Infinity Broadcasting Corporation*, 3 FCC Rcd 930 (1987).

[4] Section 1.115(c) of the Commission's Rules states, "No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunty to pass." In any event, we cannot conclude that the program "Teen Sex, What About the Kids?" is obscene under the test articulated by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973). By way of example, in light of the instructive and clinical context in which the material was presented, the Commission could not find that the material in question, taken as a whole, lacks serious literary, artistic, political or scientific value, as required by the third prong of the *Miller test*.

[5] The Commission sought and was granted remand in Act II for the purpose of conducting further proceedings relevant to the 24-hour indecency provision. A *Notice of Inquiry* in this matter was adopted by the Commission on Oct. 26, 1989, and is now pending. *Notice of Inquiry* in MM Docket No. 89-494, 4 FCC Rcd 8358 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-76

Amendment of Part 22 of the
Commission's Rules to require the
Prior Coordination of Public Land
Mobile Service applications

ORDER

Adopted: May 3, 1990; Released: May 7, 1990

By the Chief, Common Carrier Bureau:

1. On May 1, 1990, Telocator requested an extension of time to May 14, 1990, in which to file comments on the Notice of Proposed Rule Making in the above-referenced proceeding. Comments currently are due on or before May 7, 1990.

2. Telocator states that it has been conducting an in-depth review of the engineering issues raised by the Notice and that Telocator's members have been exploring various alternatives to the proposals. Telocator requests the extension of one week so that it can complete its engineering and internal review process and submit useful comments.

3. We find that good cause has been shown for a brief extension, the grant of which will not significantly delay this proceeding. Accordingly, the extension of time request is GRANTED and comments on the prior coordination proposal from all parties are due on or before May 14, 1990. Moreover, in order to afford parties sufficient time to prepare reply comments, the time for filing replies IS EXTENDED to May 30, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-172

In re Applications of

CAROL SUE SPRAKER (hereafter "Spraker") — File No. BPH-880406MH

JOSEPH B. PRATER AND JOSEPH P. DURHAM, A PARTNERSHIP, d/b/a PRATER AND DURHAM (hereafter "P & D") — File No. BPH-880406MJ

HEART OF VIRGINIA BROADCASTING (hereafter "Heart") — File No. BPH-880407ND

I.L. WARD, JR., INC. (hereafter "Ward") — File No. BPH-880407NE

For a Construction Permit for a New FM Station on Channel 268A; 101.5 MHz in Vinton, Virginia

HEARING DESIGNATION ORDER

Adopted: March 13, 1990; Released: May 10, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *P & D.* In response to Section III, Financial Qualifications, of FCC Form 301, P & D has indicated that it does not have sufficient funds to construct and operate the proposed facilities for three months without revenue, but that it was in the process of obtaining financing. Since no amendment has been received which rectifies this deficiency, a financial issue will be specified.

3. The applicant has indicated that its principals, Joseph B. Prater and Joseph P. Durham, "have employment relationships, but no ownership or official capacities, with existing radio stations." However, P & D has failed to specify the location of these radio stations or in what capacities its principals are employed. Since this employment represents a potential violation of the Commission's cross-interest policy, P & D will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order detailing the location and positions of employment held by its principals. Upon review of the amendment, the Judge will determine whether or not a cross-interest issue is justified.

4. *Heart.* In an amendment filed on June 23, 1988, which *inter alia* sets forth the media interests of its principals, Heart has indicated that Gregg P. Skall ("Skall"), was the Assistant Secretary of Joyner Communications, Inc. ("Joyner"). Heart stated that Joyner was the licensee of WZFX(FM), Whiteville, North Carolina; WIKS(FM), New Bern, North Carolina; WQOK(FM), South Boston, Virginia; and the proposed assignee for WMVA(AM & FM), Martinsville, Virginia. However, Commission ownership files indicate that Skall is the Vice President and Assistant Treasurer of Joyner. Joyner is the licensee of WZFX(FM), Whiteville, N.C. and WTFX(FM), Watertown, Wisconsin. The Commission's ownership records also indicate that Skall is the Vice President of Lisa Broadcasting, Inc. ("Lisa"). Lisa is currently the licensee of WROV(FM) [formerly WMVA(FM)], Martinsville, Virginia and WROV(AM), Roanoke, Virginia. Because of these inconsistencies with respect to Heart's June 23, 1988 amendment, Heart will be required to file an amendment within 30 days of the date of this Order with the presiding Administrative Law Judge setting forth the current media interests of Gregg P. Skall. Furthermore, an appropriate issue will be specified for Heart's failure to comply with 47 C.F.R. § 1.65 with respect to its requirement to report to the Commission any changes in the media interests of its principals.[1]

5. In response to Section IV (Program Service Statement) of FCC Form 301, Heart has indicated that the proposed station will serve Staunton, Virginia. Since this city is not the proposed community of license for Heart's instant application, Heart will be required to file an amended program service statement with the presiding Administrative Law Judge within 30 days of the release of this Order.

6. *Ward.* Information before the Commission indicates that Ward was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a

Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Ward's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Ward in this proceeding.

7. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Ward would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

8. *Other Matters*. Heart petitioned for leave to amend its application on January 5, 1990. Ward has petitioned to amend its application on November 30, 1988, December 12, 1988, December 22, 1988, December 29, 1988, January 13, 1989 and January 19, 1989. The accompanying amendments were filed after June 27, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to P & D, whether the applicant is financially qualified.

2. To determine whether Heart timely apprised the Commission of changes in the media interests of its principals in accordance with 47 C.F.R. § 1.65.

3. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Ward.

4. To determine whether Ward's organizational structure is a sham.

5. To determine, from the evidence adduced pursuant to Issues 3 and 4 above, whether Ward possesses the basic qualifications to be a licensee of the facilities sought herein.

6. To determine whether there is a reasonable possibility that the tower height and location proposed by Ward would constitute a hazard to air navigation.

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That P & D shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That Heart shall submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order which sets forth the current media interests of Gregg P. Skall.

13. IT IS FURTHER ORDERED, That Heart shall submit an amended programming service statement to the presiding Administrative Law Judge within 30 days of the date of this Order in accordance with paragraph 5, above.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Heart and Ward ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Heart's June 23, 1988 amendment also indicated that Skall is a Director of D&D Communications, Inc., a limited partner in an application for a new FM station in Upper Arlington, Ohio and that Skall is a partner in Oceanside Communications, Inc., an applicant for an FM station in Hampton, New Hampshire. This information is consistent with the Commission's ownership records.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 90 of the Commission's Rules to Modify Application Requirements for End Users of Specialized Mobile Radio Systems	RM-6755

ORDER

Adopted: May 4, 1990; Released: May 10, 1990

By the Chief, Private Radio Bureau:

INTRODUCTION

1. On April 20, 1989, the American SMR Network Association (ASNA) filed a Petition for Rule Making (Petition) concerning Specialized Mobile Radio (SMR) systems and user licensing requirements. Pursuant to Section 90.655 of the Commission's Rules, 47 C.F.R. § 90.655, after licensing the SMR operator, end users purchasing communications service from an SMR licensee are required to obtain a license to operate their associated control stations and mobile units. ASNA requests that we amend Section 90.655 to eliminate end user licensing and replace it with a system whereby SMR operators would be licensed for the base stations, mobile units and control points, or in other words, fleet licensed.

BACKGROUND

2. ASNA's proposal was placed on Public Notice on May 12, 1989 and attracted few comments and little support. CTIA and Telocator strongly oppose ASNA's petition and the concept of fleet licensing in general, arguing that implementation of such a scheme could erode the distinction between private and common carriers and could also violate Section 332(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 332(c). API also expresses strong opposition, contending that ASNA's proposal will not ensure accurate SMR loading information. Motorola and SIRSA likewise oppose ASNA's Petition, although they would favor the elimination of end user licensing if to do so would not threaten the integrity of the licensing process. ASNA, in its Reply Comments, acknowledges the criticisms submitted against its proposal and suggests that we consider alternatives to the end user licensing process.

DISCUSSION

3. The central issue raised by ASNA's Petition is whether we should continue to process separate licenses for each end user purchasing service on an SMR system. Our primary reason for licensing end users is to determine how many control stations and mobile units are operating on each SMR system. Under our current licensing process, we receive such information from end user license applications and use this information to generate a card containing the mobile loading information ("mobile loading cards") for each SMR system. We update these mobile loading cards continuously from subsequent end user licenses.

4. We use these mobile loading cards for a variety of purposes. First, mobile loading information can assist the Commission in formulating long term policy goals for private land mobile spectrum management by helping to ensure spectrum efficiency, quantify spectrum utilization and illustrate trends in the SMR industry. Second, this information aids the Commission in carrying out certain administrative and enforcement activities and in determining whether a system meets the threshold requirements to qualify for certain authorizations or benefits. These threshold requirements include the exclusivity and sharing of conventional SMR systems;[1] obtaining additional frequencies within 40 miles of a system;[2] placement on the waiting list and qualifying for additional channels;[3] obtaining authorization for a system;[4] permissibility of partial assignments;[5] channel cancellations;[6] and several reporting requirements.[7]

5. Our end user licensing process is also designed to assure compliance with statutory requirements other than those set by the Communications Act, such as the Federal Aviations Act of 1958, as amended,[8] and the National Environmental Policy Act of 1969 (NEPA).[9] The Federal Aviation Act of 1958 requires us to ensure that antennas do not exceed twenty feet above the ground or an existing man-made structure. If they do exceed the limit, the applicant must obtain Federal Aviation Administration (FAA) clearance.[10] The NEPA requires us to prepare an environmental assessment if a radio facility will cause a major impact on the quality of the environment.[11]

6. As previously observed, the few parties commenting on this proceeding express serious concern about the impact that eliminating end user licensing could have on our licensing process. Given that end user licensing information is required to carry out functions integral to our licensing process, we foresee a continuing need to collect such information in some format. To this end, there is no viable alternative before us that would result in the collection of end user information essential to our processes at this time. We have therefore decided to terminate this proceeding without further action. If, however, any party is interested in pursuing this issue and offers for our consideration viable alternatives for the collection of end user data, we remain open to such alternatives. At this time, however, we find that the current record does not support further consideration of the proposals set forth in the ASNA Petition.

7. In view of the above, IT IS ORDERED that the Petition for Rule Making filed by the American SMR Network Association IS HEREBY DISMISSED. This action is taken under the authority set forth in Sections 0.331, 1.401 and 1.407 of the Commission's Rules. 47 C.F.R. §§ 0.331, 1.401 and 1.407.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] 47 C.F.R. § 90.621(a)(2) (exclusivity of conventional systems); § 90.621(d) (co-channel protection); § 90.621(e) (co-channel protection); § 90.625 (exclusivity of conventional systems and authorization of additional channels); § 90.633(b) (exclusivity of conventional system); § 90.633(f) (authorization of frequencies in wide-area).

[2] 47 C.F.R. § 90.623(c)(2) (additional conventional system within 40 miles of existing conventional); § 90.627(b)(2) (additional trunked system within 40 miles of existing trunked system); § 90.623(d) (additional conventional frequencies within 40 miles of existing or pending application of trunked system).

[3] 47 C.F.R. § 90.611(d) (placement on waiting lists); § 90.631(c) (trunked system obtaining additional channels by inter-category sharing or through assignment); § 90.633(e) (additional frequency pairs for authorized conventional channels); § 90.625 (additional channels for conventional systems); § 90.621(g)(2) & (g)(3) (approvel of additional/inter-category sharing).

[4] 47 C.F.R. §§ 90.631(a) (authorization of trunked systems); § 90.633(a) (authorization of conventional systems).

[5] 47 C.R.R. § 90.609(c) (permissibility of partial assignments).

[6] 47 C.F.R. § 90.631(b) (channel cancellations). Our channel recovery program remains in effect until June 1, 1998, when the last group of licensees could conceivably jeopardize their authorizations by failing to meet our established mobile loading levels.

[7] 47 C.F.R. § 90.651(a) & (b). Reporting required on an annual basis, at time of renewal, upon request, within 8 months of grant of a license for a conventional system. 47 C.F.R. § 90.651(c).

[8] 49 U.S.C. §§ 1301- et. seq. (Supp. III 1985).

[9] 42 U.S.C. §§ 4321- et. seq. (Supp. III 1985).

[10] 47 C.F.R. § 90.119 (a)(2)(ii) (1988) (FAA clearance).

[11] 47 C.F.R. §§ 1.1306-1307 (1988) (environmental impact).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New York Telephone Transmittal No. 1031
Revisions to
Tariff F.C.C. No. 41

ORDER

Adopted: May 3, 1990; Released: May 4, 1990

By the Chief, Common Carrier Bureau:

1. This New York Telephone (NYT) transmittal increases NYT's Carrier Common Line (CCL) rates. The revisions also take into account the effects of a Commission staff audit report.[1] MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate, and NYT filed a reply. Transmittal 1031 is scheduled to become effective May 5, 1990.

2. MCI argues that NYT has failed to reflect projected increases in common line (CL) demand, and failed to adjust its revenue requirement to include separations changes that became effective on January 1, 1990. MCI Petition at 2-4. These changes, MCI alleges, would reduce both expenses and investment, thus reducing the amount of NYT's revenue shortfall. *Id.* at 2-3.

3. NYT, in its reply, maintains that if it included all the projected changes in investment, expenses, and demand it would require a greater increase to earn a 12 percent return. According to NYT, it was using the same methodology the Bureau used in reducing NYT's traffic sensitive rates in the Bureau's *Prescription Order*.[2] NYT Reply at 2-6.

4. The Common Carrier Bureau has reviewed Transmittal 1031, the description and justification supporting it, the January-February 1990 data NYT submitted at our request, and the pleadings. We conclude that no compelling argument has been presented that NYT's tariff revisions are patently unlawful so as to require rejection or that an investigation is warranted at this time.

5. Accordingly, IT IS ORDERED that the petition of MCI Telecommunications Corporation against New York Telephone Tariff F.C.C. No. 41, Transmittal No. 1031, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Order To Show Cause and Notice of Apparent Liability for Forfeitures, 5 FCC Rcd 866 (1990) (*MECOOrder*). NYNEX states that its filing considers the effect of revisions to the rate base which result from fully reflecting disallowances of NYNEX Materiel Enterprises Company (MECO) charges as developed in the Commission Staff's audit report, discussed in the *MECO Order* at paras. 15-21.

[2] Local Exchange Carrier Access Tariff Rate and Earnings Levels, CC Docket No. 90-1, Memorandum Opinion and Order, 5 FCC Rcd 1070 (Com.Car.Bur. 1990) (*Prescription Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Company
Revisions to Tariff F.C.C. No. 1

Transmittal No. 433

ORDER

Adopted: May 3, 1990; **Released: May 4, 1990**

By the Chief, Common Carrier Bureau:

1. This Ameritech Operating Company (Ameritech) transmittal would increase Local Transport and Directory Transport rates. The Ameritech revisions also take into account the effects of a shift in demand from Special Access to switched access. MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate, and Ameritech filed a reply. Transmittal 433 is scheduled to become effective May 6, 1990.

2. MCI argues that Ameritech has not justified the rate increase; has not demonstrated the causes of the alleged underearnings; has submitted data in its Automated Reporting Management Information System (ARMIS) reports that belie Ameritech's arguments regarding the investment shift from Special Access to Local Transport; has improperly included operator services investment in its revenue requirement; and has indicated but not explained dramatic increases in investment expense. MCI Petition at 2-5.

3. In reply, Ameritech states that its Switched Access category is presently earning 11.24 percent, and the company overall is earning 11.58 percent, both rates that Ameritech characterizes as "far less than the authorized return." Ameritech Reply at 2-3. Ameritech argues that its data submission is adequate to meet the requirements of the mid-course correction filing intended to adjust its earnings levels for rate of return enforcement purposes, and is the same as that used by the Bureau in our Orders in the Docket 90-1 show cause proceeding. *Id.* at 4-5. Ameritech disputes MCI's suggestion that increases in Ameritech's Local Transport investment could be the result of a shift from Common Line to Local Transport. *Id.* at 6-9. Responding to MCI's argument that Ameritech's FCC Form 492 data differ from its ARMIS data, Ameritech asserts that its second and third quarter actuals show that, while Ameritech had projected a shift from private line loops, miles, and terminations, to Local Transport revenue requirement, the shift has in fact been much greater than projected. *Id.*

4. Finally, Ameritech explains its increased investment as being due to the need to modify or replace tandem switching offices in order to interface with the Traffic Operator Position System (TOPS) used to provide operator services functions. *Id.* at 9-11. In addition, Ameritech states, it needed additional cable and wire facilities and central office equipment to connect the TOPS to the tandem offices. *Id.* These increased expenses resulted in an increase in the Local Transport revenue requirement, Ameritech states. *Id.* at 11.

5. The Common Carrier Bureau has reviewed Transmittal 433, the description and justification supporting it, additional earnings data submitted by Ameritech, and the pleadings. We conclude that no compelling argument has been presented that Ameritech's tariff revisions are patently unlawful so as to require rejection or that an investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that the petition of MCI Telecommunications Corporation against Ameritech Operating Company Tariff F.C.C. No. 1, Transmittal No. 433, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-194

In re Applications of

B & C BROADCASTING OF LAKE CHARLES (hereafter "B & C")	File No. BPH-880602NO
BOSS ACTION RADIO LIMITED PARTNERSHIP (hereafter "Boss")	File No. BPH-880602NP
PORSCHE EVANS BROADCASTING, INC. (hereafter "Evans")	File No. BPH-880602NV
TRINITY COMMUNICATIONS, INC. (hereafter "Trinity")	File No. BPH-880602MU
SABINE BROADCAST CORP. (hereafter "Sabine")	File No. BPH-880602MY

For Construction Permit
for a New FM Station on Channel 287C2 (105.3 MHz)
in Lake Charles, Louisiana

HEARING DESIGNATION ORDER

Adopted: March 15, 1990; Released: May 10, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* Lufkin Broadcasting, Inc. licensee of KYKS(FM) on Channel 286C1, Lufkin, Texas, informally objects to the captioned applications. On February 26, 1987, KYKS applied to change its antenna height and location. KYKS's originally designated site conformed to the distance separation requirements of Section 73.207 of the Commission's Rules. In light of apparent Federal Aviation Administration (FAA) concerns, however, KYKS amended its application on May 9, 1988 to specify a new site. The second site was fully spaced to the reference coordinates of the Lake Charles allotment. The amended KYKS application (File No. BPH-870226ML) appeared on public notice on June 2, 1988 (Report No. 20345). The captioned applications, filed that same date, the last day of the Channel 287C2 window, were short-spaced to KYKS's second site. Due to the timing, the instant applicants were apparently unaware of the KYKS application. KYKS's amended application was granted June 20, 1988. Subsequently, KYKS found itself unable to secure the anticipated site. Accordingly, it secured a third site, and, on September 22, 1988, applied for a minor modification of its construction permit to specify this third site (BPH-880922IC) which was granted on April 18, 1989. The latest KYKS site, although further from Lake Charles than the second, eliminates the short-spacing to the proposal of B&C, but continues to be short-spaced to the other applicants' sites specified in the captioned applications. In light of this, KYKS requests that the Lake Charles applicants be required to amend to specify sites fully spaced to the site specified in its present minor change application (File No. BPH-880922IC). Since the Lake Charles applicants could not have known of the KYKS application prior to close of the window, fairness dictates that their applications be considered. However, the grant of any of these currently short-spaced applications will be conditioned upon the winner filing an amendment to specify a site that is not short-spaced to KYKS(FM), Lufkin, Texas.[1]

3. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by B&C, Boss, Evans, Sabine, and Trinity would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

4. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANTS	AMENDMENTS FILED
Boss	September 27, 1988
Sabine	September 29, 1988

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by B&C, Boss, Evans, Sabine, and Trinity would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That, as stated in paragraph 2 hereinabove, in the event of a grant of a construction permit in this proceeding to Boss, Evans, Sabine, or Trinity, the winner shall amend its application to specify a site that is not short-spaced to KYKS(FM), Lufkin, Texas.

9. IT IS FURTHER ORDERED, That the informal objection filed by Lufkin Broadcasting, Inc., licensee of KYKS(FM), Lufkin, Texas IS HEREBY GRANTED.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Boss and by Sabine ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Sabine, in a response to KYKS's Informal Objection, urges expeditious action in the Lufkin proceeding and asserts that upon a grant therein, it will select a fully spaced site and amend its own application accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-182

In re Applications of

TOPSAIL BEACH FM LIMITED PARTNERSHIP (hereafter "TBFLP")	File No. BPH-870812MA
GROUP THREE W, INC. (hereafter "Group 3")	File No. BPH-870812MB
ROY L. JONES (hereafter "Jones")	File No. BPH-870812ML
TOPSAIL BROADCASTING, A NORTH CAROLINA GENERAL PARTNERSHIP (hereafter "Topsail Broadcasting")	File No. BPH-870812MN
JACKSON LEE BROADCASTING LIMITED PARTNERSHIP (hereafter "Jackson Lee")	File No. BPH-870812MO

For Construction Permit
for a New FM Station on Channel 280A
in Topsail Beach, North Carolina

HEARING DESIGNATION ORDER

Adopted: March 15, 1990; Released: May 10, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although TBFLP has filed such statement, it is deficient in that it has not provided recruitment sources for minorities (32% of Pender County is black). Additionally, the statement filed by Jackson Lee listed only "local women's business and professional clubs" as its female recruitment source. This statement lacks the necessary specificity for a viable EEO program. Accordingly, TBFLP and Jackson Lee will be required to file amended EEO programs with the presiding Administrative Law Judge, or appropriate issues will be specified by the Judge.

3. *Unresolved issues.* Information before the Commission indicates that TBFLP was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

An identical three-fold issue was specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question TBFLP's qualification to be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

4. *Late-filed amendments.* The following applicant petitioned for leave to amend its applications on the dates shown. The accompanying amendments were filed after October 2, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
TBFLP	May 9, 1989; September 13, 1989

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard

comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of TBFLP.

2. To determine whether TBFLP's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether TBFLP possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That TBFLP and Jackson Lee shall file the EEO amendments described in paragraph 2, above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by TBFLP ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RICHARD CULPEPPER File No. BPH-860505MQ

For Construction Permit for a
New FM Station at Grand Rapids,
Michigan, on Channel 255A

JOHN ANTHONY BULMER File No. BPH-870824MJ

For Construction Permit for a New
FM Station at Ravena, New York,
on Channel 233A

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 1990; Released: May 11, 1990

By the Commission:

1. The Commission has before it for consideration applications for review filed by Richard Culpepper ("Culpepper") and John Anthony Bulmer ("Bulmer"), arising out of the denials of their respective petitions for reconsideration.[1]

BACKGROUND

2. This proceeding involves two applications for review stemming from allegedly dissimilar treatment afforded two applications pursuant to the Commission's commercial FM processing policies, which require applications to be substantially complete at tender in order to prevent "carelessly prepared, unprocessable applications from burdening the processing system." *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19940 (1985) (hereinafter " *Report and Order* "). A list of nearly two dozen basic tenderability criteria was specified by the Commission in Appendix D to the *Report and Order*, including the requirement pertinent to this case -- the provision of a contour map that clearly and legibly shows the proposed 60 and 70 dBU contours and the legal boundaries of the community of license. *Id.*, at 19946. Such a map, the Commission emphasized, permitted staff ascertainment of the applicant's compliance with the city-grade signal (70 dBU) requirements in 47 C.F.R. § 73.315(a) and verification of the applicant's other signal strength predictions. However, with regard to the contour map and all other tenderability criteria, the Commission further stated that:

> . . .If any of the above information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender.

Id.

Culpepper

3. Culpepper's application to serve Grand Rapids, Michigan on Channel 255A was filed on May 5, 1986, and included a contour map that depicted what appeared to be a major portion of Grand Rapids located to the southwest of his proposed Walker, Michigan transmitting antenna site. The map failed, however, to define the boundary lines separating Grand Rapids from the rest of Kent County. Pursuant to the Commission's above-noted tenderability requirement, his application was returned by the staff on April 15, 1988 as not acceptable for tender. On May 4, 1988, Culpepper petitioned for reconsideration of this action, arguing that his application was "substantially complete" as that term was defined in *James River Broadcasting Corporation v. FCC*, 399 F.2d 581 (D.C. Cir. 1968), and therefore tenderable. The Bureau denied Culpepper's petition, detailing the recent processing changes superceding *James River* and concluding that the staff had made no factual or legal processing error in its April return. *David S. Kuiper*, 3 FCC Rcd 4802 (MM Bur. 1988).

4. Culpepper's application for review concedes that the community boundaries were not correctly outlined in the engineering portion of his application. Application for Review, at page 3. However, citing *Larry Langford*, 3 FCC Rcd 4746, 4747 (MM Bur. 1988), Culpepper contends that it was possible for the Bureau, drawing on the application as a whole, to determine that his proposal was in substantial compliance with the Commission's coverage requirement. Application for Review at page 8.[2] Finally, Culpepper again asserts that the Bureau should have accepted his May 12, 1988 curative amendment pursuant to the policy established in *James River*.

5. Oppositions to Culpepper's pleading were filed on behalf of two of the Grand Rapids applicants. Haith Broadcasting Corporation argues that "the very essence" of the Commission's MM Docket 84-750 "hard look" tenderability standards "would be destroyed" if the Commission accepted Culpepper's curative amendment. Haith Opposition, at page 3. FM Grand Rapids Limited Partnership claims that the Bureau's staff could not be expected "to determine compliance with city grade coverage requirements . . . based simply on an approximation of where the legal boundaries of the community of license *might* be." FM Grand Rapids Opposition, at page 4. Further, FM Grand Rapids argues that *James River* is inapposite in this matter since applicants were given adequate notice in the Federal Register of the *Report and Order's* commercial FM application processing revisions.

Discussion

6. While MM Docket 84-750's "hard look" processing revisions are admittedly strict, the Commission has nevertheless stated that it retains the flexibility to accept those applications with inconsistent or incorrect responses if the tenderability matter could be resolved or the information derived, "drawing upon the application as a whole." *Report and Order*, at 19946. In *Larry Langford*, the Bureau resolved the question of inconsistently specified coordi-

nates by drawing upon the correct plotting of the applicant's site on both its site and contour maps. However, Culpepper's reliance on *Langford* is misplaced. In the instant matter, the staff is unable to derive information concerning Grand Rapids' boundaries since no portion of Culpepper's application defines where the city ends and the rest of Kent County begins. Furthermore, the general area depicted as Grand Rapids lies very close to Culpepper's predicted 70 dBU contour. Given that Culpepper proposes a Class A facility and that Grand Rapids is fairly large, it is not self evident that the 70 dBU contour easily encompasses the city. Simply stated, Culpepper's application is fatally flawed since no verification of his claimed principal city coverage can be made without knowing the extent of Grand Rapids' boundaries in relation to its predicted 70 dBU contour.

7. Culpepper's reliance on the applicability of the U.S. Court of Appeals' *James River* ruling is also misplaced. Until June 1985, the Commission's *James River* policy permitted the *nunc pro tunc* acceptance of a returned commercial FM application, if resubmitted within 30 days with a minor curative amendment. Earlier, at the time of the *James River* decision, the rules then in effect allowed mutually exclusive applicants to file minor curative amendments at any time prior to the adoption date of the order designating the application for hearing. *See James River*, at 583. However, the processing rules which were the basis for the *James River* policy were "dramatically changed" in MM Docket 84-750 to prohibit the filing of tenderability amendments subsequent to the original filing window period. *See Report and Order* at 19941, and 47 C.F.R. § 73.3522(a)(6). Since Culpepper's curative amendment was filed after the close of the filing window, it is untimely.

Bulmer

8. Bulmer's application was filed 25 days after the close of the June 24-July 30, 1987 filing window to serve Ravena, New York on Channel 233A and 11 days after Ravena Broadcast Partners ("RBP") had filed the first application in that proceeding. RBP's contour map pinpointed Ravena with an arrow drawn from the label "Principal Community" to the community's specified location on the map along the southern border of Albany County. The 180-degree radial extends through this location and continues southerly within RBP's predicted 70 dBU contour into Greene County. This map and other pertinent portions of RBP's application were examined, and the application was found acceptable for tender (*Public Notice* Report No. 14004, released September 9, 1987). [3] On September 11, 1987, Bulmer filed his petition to reverse this finding, arguing that RBP did not satisfy the Commission's requirement for a contour map "clearly and legibly" showing the legal boundaries of its community of license. Lacking such map, Bulmer contended, the staff could not determine whether RBP complied with 47 C.F.R. § 73.315(a), the Commission's principal community coverage requirement.

9. In rejecting Bulmer's petition, the Bureau stated that the staff was able to draw upon the applicant's verified transmitter coordinates and predicted signal strength contours to confirm that RBP's 70 dBU contour encompasses not only the entire area identified as Ravena in Albany County but also the nearby communities of New Baltimore and Hannacroix south of Ravena in Greene County. *Letter to Jerrold Miller, Esq. from Larry D. Eads, Chief, Audio Services Division*, dated May 3, 1988. The Bureau's letter noted that RBP's method of identification of its principal community on its contour map was appropriate where the boundaries are not ascertainable or of such small size as to be imperceptible.

10. Bulmer's application for review contends that the denial of his petition was "fatally flawed" since the question of RBP's tenderability could not have been determined "solely by looking at the application as originally filed." Application for Review at page 2. Further, Bulmer claims the Commission has "made it clear that it is permissible, and even expected, for the applicant to draw the community's boundaries on the map, just as it draws the contours and the other showings required by Question 16 of Section V-B of Form 301." *Id.*, at page 4. RBP "simply omitted Ravena's boundaries," Bulmer states, "and gave neither reason nor explanation for its omission." *Id.*, at page 3. Citing recent treatment afforded Culpepper's application in *Kuiper*, Bulmer claims that the Commission, in similar circumstances, returned as not acceptable for tender applications failing to depict the legal boundaries of their community of license. Supplement to Application for Review, at page 2. Finally, Bulmer disputes the Bureau's finding of RBP's adequate signal strength coverage, arguing that "there is no way of knowing how far to the west or northwest Ravena's boundaries extend [and therefore] whether all or even 80% of Ravena is within RBP's [70 dBU] contour." *Id.*, at page 4.

11. In opposition, RBP contends that its 70 dBU contour "completely and unmistakably encompasses all of Ravena." Opposition, at page 3. Further, in explicit contrast to *Kuiper*, RBP notes that Grand Rapids is "a large city (with) clearly defined boundaries and these boundaries must be shown. Ravena, on the other hand, is a small community (less than two square miles) with no definite boundaries." Opposition to Supplement to Application for Review, at page 2.

Discussion

12. Bulmer has reasonably inferred from the Bureau's action in *Albert Gary*, 3 FCC Rcd 2997 (MM Bur. 1988), that "the proposed community of license must be shown with clarity on the contour map" in order for the staff "to establish that the Commission's city grade requirement is met." Application for Review at page 3. However, his inference that such clarity can be achieved solely by drawing the community of license's boundaries on the contour map is erroneous. If the predicted 70 dBU contour, taken in conjunction with a depicted small community, are such that we can confidently and reliably ascertain that there is compliance with the city coverage requirement, we need not insist that the boundaries be outlined.

13. Despite the lack of accurate boundary lines, RBP's contour map is neither fatally flawed nor procedurally incorrect. The Bureau's May, 1988 action denying Bulmer's petition made it abundantly clear what physical evidence (identification of the community of license within the 70 dBU contour and a scale of distance) satisfied the pertinent tenderability requirement, how the staff used the tendered information to confirm RBP's claim of principal city coverage, and why this case complies with the FM "hard look" processing procedures.

14. Given his reliance on *Gary*, Bulmer did not note the obvious parallels between the Bureau's actions in that case and in the instant proceeding. In *Gary*, the Bureau

found that the contour maps submitted by two of the applicants to serve Killington, Vermont, were of sufficient clarity and legibility to determine the proposed community of license despite their acknowledged failure to depict Killington's legal boundaries on their respective contour maps. 3 FCC Rcd at 2998.[4] Bulmer's reliance on *Kuiper* is misplaced since, as described above, Culpepper's contour map did not clearly and legibly place the whole of Grand Rapids within the predicted 70 dBU contour.

CONCLUSION

15. The Commission has stated that "it was clearly not the intent of the [FM "hard look" processing] guidelines to penalize applicants arbitrarily if the needed information can be derived from the application as a whole." *Star Signal Corporation*, 1 FCC Rcd 405, 406 (1986). Where exact replications of the community of license's legal boundaries are not possible or provided, the staff deems acceptable those contour maps clearly placing the principal community within the 70 dBU contour. The contour map submitted by RBP met this criteria, and therefore its application was accepted for tender. In the case of Culpepper's contour map, however, the legal boundaries of Grand Rapids in relation to the predicted 70 dBU contour could not be confidently and reliably ascertained.

16. Accordingly, IT IS ORDERED, That the applications for review filed by Richard Culpepper and John Anthony Bulmer ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Bulmer's petition was styled a petition "to reverse finding of tenderability."

[2] For a general discussion of the Commission's substantial compliance policy, *See John R. Hughes, et al.*, 50 Fed. Reg. 5679 (1985); *see also, Susan Lundborg*, 2 FCC Rcd 3895 (MM Bur. 1987); *Jessamine County Communications, Ltd.*, 2 FCC Rcd 4273, 4274 (MM Bur. 1987).

[3] RBP's application was subsequently found acceptable for filing (*Public Notice* NA-55, released February 19, 1988) and, shortly thereafter, granted on May 3, 1988. Pursuant to 47 C.F.R. § 73.3573(f)(3)'s requirement dissolving the queue of applications filed behind the lead applicant when a construction permit is issued to the first fully qualified applicant to file a tenderable and acceptable application, Bulmer's application was dismissed on the same date.

[4] Killington Broadcast, Ltd. (File No. BPH-851030AN) identified Killington with an arrow to the town's location on the map. Mountain Broadcasting Limited Partners (File No. BPH-851030MP) identified Killington's location on an inset to its contour map (Figure 1) with the note that the unspecified boundaries of Killington were located within the inset display of Sherburne, Vermont which, in turn, was situated well within its predicted 70 dBU contour.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-305

In the Matter of

General Telephone Operating Companies Revisions to Tariff F.C.C. No. 1 — Transmittal Nos. 572 and 587

ERRATUM

Released: May 7, 1990

1. On May 3, 1990, the Common Carrier Bureau released an Order, DA 90-647, in the the above-captioned proceeding. The following corrections are made to that Order.

2. Paragraph 6 of the Order, beginning with the seventh sentence of the paragraph, should read as follows:

> Similarly, we conclude that Transmittal 587, which modifies the rate structure for all GTOC DS3 general rates, should be subject to an accounting order and to the outcome of the Docket 89-305 investigation. For purposes of imposing an accounting order, we are suspending Transmittals 572 and 587 for one day.

3. Paragraph 7 should read as follows:

> Accordingly, IT IS ORDERED that the GTE Operating Companies Tariff F.C.C. No. 1, Transmittals 572 and 587 ARE INCORPORATED into the Commission's ongoing investigation in CC Docket No. 89-305.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

USA MOBILE COMMUNICATIONS, INC. II — File Nos. 23914-CD-P/ML-1-89, 23915-CD-P/ML-1-89

For authority to construct additional facilities in the Public Mobile Service on Frequency 158.10 MHz for Station KNKC338 at Walton and Florence, Kentucky

MIKE LANTER — File No. 29532-CD-P/L-1-89

For authority to construct a new facility in the Public Mobile Service on Frequency 158.10 MHz at Williamstown, Kentucky

MEMORANDUM OPINION AND ORDER

Adopted: May 7, 1990; Released: May 11, 1990

By the Chief, Mobile Services Division:

1. USA Mobile Communications, Inc. II ("USA Mobile") filed the captioned applications on February 22, 1989, seeking authority to establish additional transmitter locations for one-way facilities at Walton and Florence, Kentucky. Mike Lanter ("Lanter") filed the captioned application on May 30, 1989, seeking authority to establish a new transmitter location for a one-way facility at Williamstown, Kentucky. The applications were listed as electrically mutually exclusive.[1]

I. BACKGROUND

2. On September 22, 1989, USA Mobile filed a "Request for Comparative Hearing," pursuant to Section 22.33(c)(1) of the Commission's Rules.[2] In support of its request, USA Mobile asserts that it is an existing public land mobile licensee operating in Ohio, Kentucky, and Indiana, providing service to about 150,000 units. USA Mobile argues that its applications are integral to its full-service, wide-area coverage market expansion plans whereas Lanter's application is for a new stand-alone facility. Thus, USA Mobile asserts that the public interest will be served by holding a comparative hearing because it would have the chance to establish that its need for the frequency is greater than Lanter's.

II. DISCUSSION

3. USA Mobile has failed to demonstrate that it is eligible for a comparative hearing. Selection by lottery among mutually exclusive applicants is the general rule, and exceptions to the rule are strictly construed and enforced. *See, e.g., Metro Mobile Corporation*, 5 FCC Rcd 1040 (Mob. Serv. Div. 1990); *Mobile Phone of Texas*, Mimeo No. 2728 (Mob. Serv. Div. released Feb. 22, 1985). Section 22.33(c)(1) requires that applicants requesting a comparative hearing satisfy certain requirements. USA Mobile has satisfied one of these requirements because its proposed transmitters at Walton and Florence, Kentucky, are located within 40 miles of an existing USA Mobile location at Cincinnati, Ohio, and are for the same frequency.

4. Section 22.33(c)(1), however, further requires that a requesting applicant demonstrate a demand by existing subscribers for expanded service. We find that USA Mobile's showing accompanying its hearing request is not sufficient to justify a comparative hearing. [3] We have previously denied hearing requests when an applicant did not submit specific information which is necessary to comply with Section 22.33(c)(1). *See Bay Springs Telephone Co.*, 3 FCC Rcd 2133 (Mob. Serv. Div. 1988) (mere assertion that all of subscribers contacted, signed written requests for proposed expanded service found unpersuasive); *Radio Call Company of Long Island, Inc.*, 2 FCC Rcd 6772 (Mob. Serv. Div. 1987) (mere representation that expanded service is needed in response to subscriber demand is insufficient); *Speed Call, Inc.*, 2 FCC Rcd 6530 (Mob. Serv. Div. 1976) (subscriber survey forms submitted to indicate demand were found insufficient). Similarly, USA Mobile has failed to show that the public interest would be served by using a comparative hearing procedure. Therefore, we deny USA Mobile's request for comparative hearing.

ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the "Request for Comparative Hearing" filed by USA Mobile Communications, Inc. II IS DENIED.

6. IT IS FURTHER ORDERED that a lottery between the captioned applications of USA Mobile Communications, Inc. II and Mike Lanter SHALL BE HELD at a time and place to be specified in a subsequent public notice.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Public Notice, Rpt. No. PMS-89-47, Mimeo No. 4136 (released Aug. 23, 1989.)

[2] Section 22.33(c)(1) states that a mutually exclusive applicant is eligible to request a comparative hearing in lieu of the random selection procedure if it is:

> an applicant proposing to add one or more transmitter locations to an authorized station on the same frequency or frequencies for which it is already licensed and within 40 miles of existing transmitter locations on those fre-

quencies, and when the applicant demonstrates in its application a demand by its existing subscribers for the expanded service . . . .

[3] USA Mobile has not demonstrated a demand by existing subscribers on frequency 158.10 for the expanded service. This showing is required by Section 22.33(c)(1) of the Rules to justify a comparative hearing. At most, USA Mobile has shown that some of its customers on other frequencies have a need for digital display paging at the proposed locations. *See generally RAM Communications of Michigan, Inc.*, Mimeo No. 4848 (Mob. Serv. Div. released June 3, 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 11, 1990

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELL ATLANTIC'S COMPARABLY EFFICIENT INTERCONNECTION PLAN FOR RADIO - BASED SERVICES

On March 22, 1990, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a comparably efficient interconnection (CEI) plan for radio-based enhanced services. Bell Atlantic proposes to offer radio-based enhanced services, such as home energy management service. In its filing, Bell Atlantic identifies several underlying basic services that will be used in connection with these enhanced services -- paging services, standard business lines, access services, and private lines. Bell Atlantic also notes that it has filed a request for a waiver of the Modification of Final Judgment for these services, and it urges prompt Commission action on this CEI plan.

As required in the *Computer III* proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988)), the Commission must approve this CEI plan before Bell Atlantic can begin implementing the proposed service on an unseparated basis.

In its filing, Bell Atlantic describes how it will satisfy the Commission's CEI parameters, and states that it will account for the joint and common costs of the services pursuant to its cost allocation manual. Bell Atlantic also describes its plans for complying with the other *Computer III* nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting, and disclosure of network information.

Interested parties should file comments on this plan by **June 4, 1990,** and reply comments by **June 19, 1990,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Bell Atlantic's plan can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Transmittal No. 351
Tariff F.C.C. No. 1

ORDER

Adopted: May 1, 1990; Released: May 2, 1990

By the Chief, Common Carrier Bureau:

1. On February 7, 1990, the Bell Atlantic Telephone Companies (Bell Atlantic) filed its Transmittal No. 351 to increase its charges for unauthorized primary interexchange carrier (PIC) changes. On February 22, 1990, petitions for rejection or suspension and investigation were filed by MCI Telecommunications Corporation (MCI), US Sprint Communications Company Limited Partnership (Sprint), International Telecharge, Inc. (ITI), and the Operator Service Providers of America (OSPA).

2. Currently, Bell Atlantic charges $5.00 to switch end users from one PIC to another. The Bell Atlantic Transmittal assesses higher charges ($23.45 for business and residential telephones, and $39.96 for payphones) if an interexchange carrier (IC) notifies Bell Atlantic that an end user has authorized a PIC change, the end user later denies authorizing the change, and the IC is unable to produce a letter of authorization or agency (LOA) signed by the end user. The charge for authorized PIC changes would remain at $5.00.

3. Bell Atlantic asserts that unauthorized business and residential PIC changes require 47 minutes of labor on the part of Bell Atlantic's employees, including negotiating with customers, service order activities, investigations, adjustment, and billing. Bell Atlantic Description and Justification (D&J) at Figure 3-1. It insists that unauthorized payphone PIC changes are more costly than other unauthorized PIC changes because payphone changes require a trip to the customer's premises to change the dialing card. *Id.* at 3-3.

4. MCI and Sprint claim that Transmittal 351 would penalize ICs for unauthorized PIC changes that are not their fault, such as PIC changes in which end users neglected to return LOAs, or PIC changes caused by administrative errors by Bell Atlantic.[1] MCI Petition at 2-3; Sprint Petition at 3-4. Some petitioners assert that Bell Atlantic could apply this proposed rate increase as a type of punitive fine, and that Bell Atlantic is attempting to usurp some of the regulatory functions of the Commission. ITI Petition at 9-11; OSPA Petition at 4-5.

5. OSPA and ITI allege that Bell Atlantic's cost support data does not comply with Section 61.38 of the Commission's Rules because Bell Atlantic estimates of future demand are incomplete. OSPA Petition at 9-10; ITI Petition at 6-7. Sprint contends that Bell Atlantic's cost support is inadequate because it did not use a "time and motion" study and overstates the amount of labor required to resolve PIC change disputes. Sprint Petition at 5-6. ITI maintains that the costs of a PIC change investigation are the same whether the PIC change is ultimately determined to be authorized or unauthorized. ITI Petition at 6-7. Finally, ITI asserts that the rate increase would result in cross-subsidization between states in Bell Atlantic's region and would have a disproportionate impact on ICs other than AT&T. ITI Petition at 10-11.

6. Bell Atlantic disputes ITI's contention that the costs for authorized and unauthorized PIC changes are the same. It dismisses as irrelevant OSPA's assertion concerning studies of the effect of Transmittal 351 on demand. *Id.* at 3. Bell Atlantic also asserts that its tariff does not constitute a penalty because the rates are cost-based. *Id.* at 5-6.

7. The Common Carrier Bureau has reviewed Transmittal No. 351 and the various pleadings. We conclude that no compelling argument has been raised that the tariff revisions as amended are patently unlawful so as to require rejection, and that an investigation is not warranted at this time.

8. Accordingly, IT IS ORDERED that the petitions to reject, or in the alternative to suspend and investigate, Bell Atlantic F.C.C. Tariff No. 1, Transmittal No. 351, filed by MCI Telecommunications Corporation, US Sprint Communications Company Limited Partnership, International Telecharge, Inc., and the Operator Service Providers of America, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] The relevant language in Bell Atlantic's tariff implies that it accepts as proof of authorization LOAs signed by any member of a household or business with apparent authority to authorize a PIC change.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Transmittal No. 294
Tariff F.C.C. No. 4

ORDER

Adopted: May 1, 1990; Released: May 2, 1990

By the Chief, Common Carrier Bureau:

1. On February 16, 1990, the BellSouth Telephone Companies (BellSouth) filed Transmittal No. 294 to increase charges for unauthorized primary interexchange carrier (PIC) changes. On March 5, 1990, petitions for rejection or suspension and investigation were filed by MCI Telecommunications Corporation (MCI), US Sprint Communications Company Limited Partnership (Sprint), and International Telecharge, Inc. (ITI). The Operator Services Providers of America (OSPA), a trade association representing the competitive operator services industry, National Telephone Services and Telesphere Communications, Inc. (collectively, OSPA), filed a joint petition for rejection or suspension and investigation.

2. Currently, BellSouth charges $1.65 to switch end users from one PIC to another. This Transmittal assesses a higher charge ($19.41 for business and residential telephones and $34.19 for payphones) against an interexchange carrier (IC) if the IC is unable to produce a letter of agency (LOA) signed by the end user authorizing a PIC change. The charge for authorized PIC changes would remain $1.65.

3. Petitioners claim it is unfair to charge ICs for unauthorized PIC changes because, they claim, ICs are often not the cost causer in the PIC change dispute. MCI Petition at 3-4; Sprint Petition at 3-4; ITI Petition at 10-11; OSPA Petition at 7-8. Sprint notes that the Commission originally required ICs to obtain signed LOAs before providing service, but later modified this requirement to enable ICs to provide service while making reasonable efforts to obtain LOAs.[1] Sprint Petition at 3. ITI asserts that the regionally averaged rate in Transmittal 294 will result in cross-subsidization between states. ITI Petition at 9-10.

4. ITI also challenges the use of linear regression techniques to project demand. It argues that such techniques are appropriate only if demand can be expected to continue along the same trend. According to ITI, BellSouth has failed to make this showing. ITI also claims that BellSouth has not adequately explained why its new tariff will reduce demand by 50 percent. ITI Petition at 6-7. Sprint claims that BellSouth submitted data on estimated labor times with its 1989 Annual Access filings, and those times are approximately half of the times BellSouth uses in Transmittal 294. Sprint also contends that BellSouth erred in using a "top-down" study rather than a "time and motion" study to support its proposal. Sprint Petition at 4-6. OSPA contends that Transmittal 294 is an attempt to impose punitive fines and become a regulator of PIC change procedures. OSPA Petition at 3-5. ITI also claims that BellSouth makes inappropriate use of state-specific and regionally averaged rates in the same study. ITI Petition at 5-6.

5. BellSouth replies that this rate increase is designed only to recover the costs of unauthorized PIC change disputes and not as a punitive fine. It also maintains that the Transmittal is not unreasonably discriminatory because at least 95 percent of PIC change disputes are attributable to unauthorized changes. BellSouth Reply at 5-7. According to BellSouth, unauthorized PIC change service orders require more labor than authorized PIC change service orders. *Id.* at 8. BellSouth also notes that the Commission did not question the use of averaged and state-specific costs in BellSouth's annual access filings.

6. The Common Carrier Bureau has reviewed Transmittal No. 294 and the various pleadings. We conclude that no compelling argument has been raised that the tariff revisions as amended are patently unlawful so as to require rejection, and that an investigation is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petitions to reject, or in the alternative to suspend and investigate, the BellSouth F.C.C. Tariff No. 4, Transmittal No. 294, filed by MCI Telecommunications Corporation, US Sprint Communications Company Limited Partnership, International Telecharge, Inc., the Operator Service Providers of America, National Telephone Services and Telesphere Communications, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] The relevant language in Bell Atlantic's tariff implies that it accepts as proof of authorization LOAs signed by any member of a household or business with apparent authority to authorize a PIC change.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company
Revisions to Tariff F.C.C. No. 12

Transmittal No. 2171

ORDER

Adopted: May 2, 1990; **Released: May 2, 1990**

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) Transmittal No. 2171 introduces Virtual Telecommunications Network Service (VTNS) Option 37, described as a generally available offering designed and engineered for voice and data communications service. Option 37 provides VTNS service in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Option 37 rates are stabilized for a five-year period, and there is an annual minimum charge of $3.79 million. AT&T Tr. 2171 D&J at 4.

2. On April 3, 1990, US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject, or alternatively, to suspend and investigate the instant Transmittal; a reply was filed by AT&T on April 6, 1990.

3. Sprint argues that AT&T has failed to demonstrate that Option 37 is an integrated service package that is "unlike" its other component services and has therefore failed to justify the discrimination between this option and AT&T's other services. Sprint Petition at 1-2. Moreover, Sprint contends that since AT&T has now proposed 37 separate VTNS offerings with similar rate structures, it is clear that AT&T designs each of these options for one customer. Therefore, Sprint argues, the Commission should order AT&T to offer these rates under a generally available tariff, as in the case of the individual case basis rates for the local exchange carriers' DS3 service. Sprint also contends that AT&T's cost support for this option "is seriously deficient," and incorporates by reference the arguments raised in the petitions it filed against VTNS Options 17, 18, and 19 found in AT&T Transmittals 1810, 1826, and 1832, respectively. *Id.* at 4.

4. AT&T argues that the rates in Option 37 are not unjustly discriminatory when compared to AT&T's rates for its individually tariffed component services, because the Communications Act prohibits discrimination only between "like" services, and the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered in separate tariffs. AT&T argues that Option 37 is functionally different from individually tariffed services in that it integrates customers' voice and data transmission needs in an economical, custom design, at rates that reflect AT&T's costs. Additionally, AT&T asserts that Option 37 includes an extensive mutual commitment between AT&T and customers as to term, volume, and level of service, which are not found in individual service tariffs. AT&T Reply at 3-4.

5. AT&T also argues that Option 37 is generally available because there are no tariff restrictions on its availability by way of geographical limitations or otherwise and because of the express, affirmative commitments of general availability contained in Tariff 12. *Id.* at 7. Finally, AT&T asserts that its cost support for Option 37 satisfies the requirements of Section 61.38 of the Commission's Rules, and that its methodologies and analyses were performed using AT&T's standard, Commission-sanctioned cost systems which the Commission has consistently found sufficient to support AT&T's Tariff 12 filings. *Id.* at 7-9.

6. The Common Carrier Bureau has reviewed AT&T Transmittal No. 2171, Sprint's petition, and related pleadings. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petition to reject, suspend, or investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2171, filed by US Sprint Communications Company Limited Partnership, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

Revision of Sections 73.3571, 73.3572
and 73.3573 of the Commission's Rules
to Permit Withdrawal of Disqualifying
Major Change Amendments

ORDER

Adopted: April 9, 1990; Released: May 1, 1990

By the Commission:

1. On our own motion we are issuing this *Order* to amend certain Commission rules to codify previously established Commission policy regarding the processing of AM, FM and television applications. Sections 73.3571 (AM), 73.3572 (TV) and 73.3573 (FM) currently require that, where an applicant submits a major amendment (*e.g.*, one that specifies a change in frequency or a substantial change in ownership) after amendments are permitted but prior to the designation of the application for a hearing, if applicable, the application is assigned a new file number and placed at the end of the processing line.[1] In comparative cases, this requirement has the effect of removing the amending applicant from the proceeding. In cases where there is a single applicant, the applicant is again vulnerable to competing applications and petitions to deny. Since the late 1970's, the Commission has permitted applicants in comparative cases to withdraw such amendments rather than be removed from the proceeding. This *Order* conforms the Commission's rules to this practice by amending Sections 73.3571, 73.3572 and 73.3573 to permit an applicant to elect to withdraw a pre-designation amendment if the effect of the amendment would be to deprive the applicant of comparative consideration. This *Order* also affords single applicants the opportunity to withdraw pre-designation major amendments rather than be assigned a new file number.

2. *Former Rules*. Under the AM, FM and television application processing rules, applications for these services are assigned file numbers when they are received, and are then processed in sequence according to those numbers. Major amendments to an application are permitted very early in the process without any adverse effect on the applicant's status. In the FM service, where a window is opened for the filing of applications for a specific community and frequency, applicants may file major amendments only during the pendency of the window. In the AM and television services, an application accepted for filing is put on an "A" cut-off public notice which provides a thirty day period for the filing of applications that are mutually exclusive with the lead application. During this period the lead applicant, and any competing applicants who file before the "A" cut-off date, are allowed to make major amendments. If a major amendment to the application is filed after major amendments are permitted, but before the application is designated for hearing, the application is removed from the processing line, assigned a new file number, and placed at the end of the line.[2] As a result, the process begins anew for that application.

3. If there are no competing applications at the time the amendment is submitted, removal of the application to the end of the processing line will primarily cost the applicant time, although the applicant is again vulnerable to competing applications and petitions to deny. However, where there are one or more applications on file that are mutually exclusive with an application amended by a major change, removal of an application to the end of the processing line is fatal to the application. All other applications will continue through the administrative process to a decision on a final grant while the amended application is returned to the start of processing, thereby eliminating any opportunity to compete for the facility.

4. These rules were intended to aid in the orderly processing of applications and to ensure that competing applicants were treated fairly. [3] When the rules were adopted some thirty years ago, there was a large backlog of poorly prepared applications that were frequently amended. Amendments involving major changes had to be placed on public notice for thirty days,[4] and required time to reprocess. Thus, to ensure that the processing of other applications was not delayed or disrupted by applications requiring major amendments the Commission implemented the procedure discussed above.[5]

5. *Policy Changes*. In the late 1970's, however, the Commission began to relax the strict application of the rules requiring assignment of a new file number to applications that contained major amendments.[6] Specifically, the Commission began to afford an applicant that filed such an amendment the opportunity to withdraw the amendment, thereby enabling that applicant to preserve its position in the processing line.[7]

6. In *Golden Shores Broadcasting Co.*, 2 FCC Rcd 4743 (1987), the Commission explained the change in policy by stating that the rule was intended to eliminate repetitive processing of applications, "not to punish applicants who inadvertently file major amendments."[8] The Commission further recognized that where the applicant withdraws its major amendment the concerns which prompted the Commission to adopt these rules are eliminated. In this regard, the processing of other applications is not disrupted, no prejudice results to the other applicants, and the harmful processing delays sought to be addressed by the rule do not occur, obviating the need to assign a new file number. Finally, the Commission noted that, by routinely notifying the applicant that its tendered amendment is considered "major" under the Commission's rules and providing the applicant an opportunity to withdraw the amendment rather than removing the applicant from the proceeding, the Mass Media Bureau was administering the rule in a manner which avoided draconian results.[9] The Commission, therefore, instructed the Mass Media Bureau to take those steps necessary to amend the rule so as to conform it to this policy.

7. *Amended Rules*. Therefore, this *Order* first implements the Commission's instructions in *Golden Shores*. Sections 73.3571, 73.3572 and 73.3573 are hereby amended to permit an applicant to withdraw a pre-designation amendment to an application that is mutually exclusive with other applications if it would require assignment of a new file number and place that applicant at the end of the processing line. The *Order* also implements changes in the rules which are beyond those specifically discussed in

Golden Shores, but which are consistent with the thrust of that decision. First, although *Golden Shores* involved an application for a construction permit for a television station, the rationale articulated in *Golden Shores* applies equally to the AM and FM rules, which are similar to the television rules in all relevant respects. Accordingly, we are also amending the rules applicable to the AM and FM services as set forth in the Appendix attached hereto.[10]

8. Second, *Golden Shores* specifically sanctioned the withdrawal or revocation of a major amendment at the processing stage of the application, but did not address whether an applicant may withdraw a pre-designation amendment, without prejudice, at the hearing stage of the proceeding. That issue subsequently came before the Commission pursuant to a remand by the Court of Appeals for the District of Columbia Circuit in *Orange Park Florida TV, Inc. v. FCC*, 811 F.2d 664 (D.C. Cir. 1987). In *Clay Television, Inc.*, 64 RR 2d 1129 (1988), the Commission, in light of confusion in the Bureau's processing practices, permitted an applicant to withdraw a pre-designation major amendment without prejudice at the hearing stage.[11] In accordance with *Clay*, the rule changes we are adopting will permit applicants to withdraw pre-designation major amendments during the hearing stage of a proceeding at the discretion of the Administrative Law Judge. The ALJ shall consider, among other things, the potential for disruption of the hearing process balanced by any pertinent equitable considerations.

9. Finally, we are extending the opportunity to withdraw a major change amendment to single applicants. While the consequences to sole applicants of filing such an amendment are not as severe as for competing applicants, they are significant. Single applicants, assigned a new file number, are again exposed to competing applications and petitions to deny. There does not appear to be any reason not to afford such applicants a similar opportunity to withdraw their major amendments and preserve their place in the processing line. Accordingly, we are amending our rules to afford sole applicants the opportunity to withdraw major amendments.

10. *Procedural Matters*. We find that prior notice and comment procedures are unnecessary to implement the rule amendments in the attached Appendix because the amendments involve general rules of agency practice or procedure. *See* 5 U.S.C. § 553(b)(3)(A). Further, because these rule changes are procedural and impose no additional burdens, but rather operate to relieve restrictions, the 30-day effective date requirements of the Administrative Procedure Act do not apply. *See* 5 U.S.C. §553(d)(3). The new rule provisions will therefore be made effective upon publication.

11. Accordingly, pursuant to Sections 4(i) and (j), and 301, 303, 308 and 309 of the Communications Act of 1934, as amended, IT IS ORDERED that Part 73 of the Commission's rules is amended as set forth in the attached Appendix, effective upon publication in the Federal Register.

12. For further information on this proceeding, contact Marilyn Mohrman-Gillis, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 73 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. §§ 154 and 303.

2. Section 73.3571 is amended by redesignating paragraph (j)(3) as paragraph (j)(4) and adding new paragraph (j)(3) to read as follows:

§ 73.3571 Processing of AM broadcast station applications.

* * * * *

(j) (* * *)

(3) Where an amendment to an application would require a new file number pursuant to paragraph (j)(1) or (j)(2) of this section, the applicant will have an opportunity to withdraw the amendment at any time prior to designation for a hearing if applicable; and may be afforded, subject to the discretion of the Administrative Law Judge, an opportunity to withdraw the amendment after designation for a hearing.

* * * * *

3. Section 73.3572 is amended by redesignating paragraphs (c)-(f) as (d)-(g) and adding new paragraph (c) to read as follows:

§ 73.3572 Processing of TV broadcast, low power TV, TV translator and TV booster station applications.

* * * * *

(c) Where an amendment to an application would require a new file number pursuant to paragraph (b) of this section, the applicant will have the opportunity to withdraw the amendment at any time prior to designation for a hearing if applicable; and may be afforded, subject to the discretion of the Administrative Law Judge, an opportunity to withdraw the amendment after designation for a hearing.

* * * * *

4. Section 73.3573 is amended by redesignating paragraphs (c)-(g) as (d)-(h) and adding new paragraph (c) to read as follows:

§ 73.3573 Processing of FM Broadcast and FM translator station applications.

* * * * *

(c) Where an amendment to an application would require a new file number pursuant to paragraph (b) of this section, the applicant will have the opportunity to withdraw the amendment at any time prior to designation for a hearing if applicable; and may be afforded, subject to the discretion of the Administrative Law Judge, an opportunity to withdraw the amendment after designation for a hearing.

* * * * *

FOOTNOTES

[1] *See* 47 C.F.R. §§ 73.3571 (AM), 73.3572 (TV) and 73.3573 (FM).

[2] This procedure applies only to amendments filed before a proceeding is designated for hearing.

[3] *Fox River Broadcasting Company*, 5 FCC 2d 669, 673 (1966); *Central Du Page County Broadcasting Co.*, 2 FCC 2d 423, 425 (1966).

[4] *See* 47 U.S.C. § 311(a) and 47 C.F.R. § 73.3580 (1988).

[5] *Revision of AM Processing Procedures*, 18 RR 1565 (1959). A similar procedure was adopted for TV and FM.

[6] At that time the Commission adopted alternative procedures to handle administrative delays in the processing of applications and to eliminate the incidence of major amendments. In *Revised Processing of Broadcast Applications*, 72 FCC 2d 202 (1979), the Commission adopted revisions of the application processing procedures. Relevant to the instant proceeding were modifications shortening the cut-off list procedures to simplify and expedite the processing of applications. Further, the Commission revised the application amendment procedures to limit the frequency and timing of amendments, thus, discouraging the filing of "skeleton applications" which were supplemented by major amendments.

[7] *See Clay Television, Inc.*, 52 RR 2d 406 (1982), *remanded sub nom. Orange Park Florida TV, Inc. v. FCC*, 811 F.2d 664 (D.C. Cir. 1987), *aff'd Clay Television, Inc.*, 64 RR 2d 1129 (1988); *Tequesta Television, Inc.*, 61 RR 2d 1403 (1987) ("*Tequesta*"); *Golden Shores Broadcasting Co.*, 2 FCC Rcd 4743 (1987) ("*Golden Shores*"); *Redwood Television Ministries, Inc.*, 52 RR 2d 1365 (1982) ("*Redwood Television* "); *Grace Missionary Baptist Church*, 80 FCC 2d 330 (1980) ("*Grace Missionary* "). In this line of cases the Commission referred to the general policy of permitting applicants the opportunity to withdraw major amendments in lieu of suffering dismissal of their applications. *Tequesta* and *Golden Shores* articulate the common sense assumption that no applicant would intentionally file a suicidal amendment.

[8] *Golden Shores*, 2 FCC Rcd at 4744.

[9] *Id. citing Redwood Television* and *Grace Missionary*, *supra* note 7.

[10] Post-designation amendments are governed by Section 73.3522(b) of the Commission's rules and, thus, are not at issue herein. *See Great River Broadcasting, Inc.*, 12 FCC 2d 561, 562-63 ¶ 5 (Rev. Bd. 1968); *Gilbert Broadcasting Corp.*, 91 FCC 2d 450, 468 ¶ 56 and n.63 (1982).

[11] Similarly, in *Tequesta*, 61 RR 2d 1403, equitable considerations dictated that an applicant be permitted to withdraw its pre-designation major amendment after the hearing record was closed but before the initial decision by the administrative law judge because the Mass Media Bureau failed to disapprove the amendment either at the time it was filed or at designation. Thus, the applicant had participated in the proceeding in the erroneous belief that the amendment was permitted.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 27, 1990

RULINGS REQUESTED REGARDING SECTION 73. 658 (m)

In a pleading dated December 26. 1989, Texas Telecasting, Inc., licensee of television station KBMT, Beaumont, Texas, has requested a ruling that, for purposes of Section 73.658(m) of the Commission's rules (broadcast non-network programming territorial exclusivity rule), Station KVHP, Lake Charles, Louisiana, should be considered a station in the same television market as Station KBMT. (MMB File 891226A)

In addition, in a pleading dated February 16, 1990, Rogue Television Corporation, proposed assignee of television station WHRC, Norwell, Massachusetts, has requested a ruling that Station WHRC should be considered a station in the Boston-Cambridge-Worcester television market. (MMB File 900116A)

Both requests cite the precedent created in *Press Television Corporation*, 4 FCC Rcd 8799 (1989), *pet. for recon. pend.*

Comments responsive to these petitions must be filed on or before May 30, 1990. Replies to these comments must be filed on or before June 14, 1990. Parties who have previously filed comments responsive to these petitions need not resubmit their pleadings.

The full texts of these requests are available for viewing and copying in the Public Reference Room (Mass Media Bureau), Room 239, 1919 M Street, N.W., Washington, D.C., or may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800. Further information concerning this matter may be obtained from Michael Ruger, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-567

In re Applications of

ALABAMA RADIO MOVEMENT, INC.	File No. BPH-870331ML
JOHNNIE F. KNIGHT	File No. BPH-870414KG
MONTGOMERY BROADCAST PROPERTIES, LTD.	File No. BPH-870415KO
JCT BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870415MB
Linda Breland Valeska d/b/a BRELAND BROADCASTING	File No. BPH-870415MI
JUNE N. PHELPS	File No. BPH-870415MM
DOUBLE LS BROADCASTING, INC.	File No. BPH-870415MN
WHITE BROADCASTING NETWORK, INC.	File No. BPH-870415MR

For Construction Permit for a New FM Station, Channel 241A, Montgomery, Alabama

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 1990; Released: May 14, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. By a *Decision*, 5 FCC Rcd 317 (Rev. Bd. 1990), the Review Board affirmed an *Initial Decision* (*I. D.*) (4 FCC Rcd 4654), granting Johnnie F. Knight's Construction Permit application for a new commercial FM broadcast station at Montgomery, Alabama. In so doing, the Board rejected a claim by Breland Broadcasting that the presiding Administrative Law Judge (ALJ) had erred in denying its petition seeking dismissal of Knight's application, pursuant to the Commission's "hard look" policy, [1] for specifying incorrect tower site coordinates in its application. The ALJ had simultaneously found "good cause" for accepting Knight's curative amendment. Without reaching the question whether the application, in fact, contravened the policy, we held that the "hard look" processing guidelines were intended to be applied at the initial staff review stage, and that nothing in the Commission's discussion introducing the policy suggested that the guidelines were to be utilized once the hearing process began. 5 FCC Rcd at 318. The Board now has before it a petition for reconsideration filed by Breland on February 22, 1990, requesting that we reconsider the above ruling in light of *Pueblo Radio Broadcasting Service*, 4 FCC Rcd 7510 (1989), a case which Breland argues holds directly to the contrary, and which was not addressed by the Board in its *Decision*. An opposition was filed by Knight, and a reply by Breland.

2. Breland's petition for reconsideration will be denied. *Pueblo* is not apposite to the ruling concerning Knight's application. That case involved an applicant that proposed an antenna height violative of the treaty styled "Agreement between the United States of America and the United Mexican States," 24 U.S.T. 1815, T.I.A.S. No. 7697. The impermissible height was proposed, notwithstanding that more than nine months earlier, the Commission had promulgated a *Public Notice* (Mimeo No. 1634, released December 23, 1985), in which it warned that applications specifying an antenna height of 100 meters above average terrain (the height specified by the Pueblo applicant) would be returned as unacceptable for filing for violating the United States - Mexican FM Agreement. A second *Public Notice*, 58 RR 2d 166, 168 (1985) (concerning the "hard look" processing policies) had also warned applicants that antenna heights may be limited in certain cases by international treaty. In spite of this general policy against acceptability, the application slipped through initial review due to a processing oversight, and the proposed violation was discovered only on the eve of commencement of the hearing. Thereafter, citing *Domega Broadcasting Corp.*, 4 FCC Rcd 1450 (1989), the presiding ALJ rejected the applicant's corrective amendment for want of "good cause," finding that the applicant had not met the "foreseeability" requirement of Section 73.3522(b)(1) of the Commission's rules, 47 CFR § 73.3522(b)(1). *Memorandum Opinion and Order*, FCC 89M-960, released March 24, 1989. In so doing, he observed that when an applicant selects a tower site close to a foreign nation's border, it is incumbent on the applicant to conduct a comprehensive research effort on potential treaty limitations concerning its site. *Id.* The Commission, itself, had earlier explicitly held in *Domega* that ignorance of the treaty's requirements did not constitute "good cause." 4 FCC Rcd at 1451. Subsequent to his adverse ruling on the amendment, the ALJ granted a motion to dismiss, concluding that no purpose would be served in permitting the applicant to continue to remain in the case. *Memorandum Opinion and Order*, FCC 89M-1999, released July 28, 1989. On appeal, we upheld the dismissal ruling, concluding that it was wholly consistent with prior Commission precedent, citing *Kerrville Radio*, 2 FCC Rcd 3441 (1987), *Kerr County Broadcasting*, 4 FCC Rcd 5021 (1989), and *Domega*, all of which involved similar treaty violations. Unlike *Pueblo*, the ALJ here found that Knight demonstrated "good cause" for filing its corrective amendment. We concurred with that determination, pointing out that under Section 73.3522(b) of the rules, 47 CFR § 73.3522(b), minor ministerial mistakes that do not disrupt the hearing proceeding are freely permitted. *See Family Broadcasting Group*, 93 FCC 2d 771,

774-775 (Rev. Bd. 1983) (amendment permitted to correct erroneous transmitter site coordinates), *review denied*, FCC 83-559, released November 29, 1983. In this regard, Knight's erroneous coordinates placed the transmitter site approximately 798 feet from the intended location. Thus, we perceive no inconsistency between the instant case and *Pueblo*. Breland's petition for reconsideration, therefore, fails to demonstrate a material error or omission that would require us to reconsider our earlier ruling. And, reconsideration will not be granted for the purpose of again debating matters on which we have already deliberated and spoken. *WWIZ, Inc.*, 37 FCC 685 (1964) *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

3. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed February 22, 1990 by Breland Broadcasting IS DENIED; and

4. IT IS FURTHER ORDERED, That the petition for leave to amend filed February 23, 1990 by JCT Broadcasting Limited Partnership IS GRANTED, and the amendment IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTE

[1] *See Report and Order on FM Application Processing*, 58 RR 2d 776 (1985). In that *Report and Order*, applicants for commercial FM stations were cautioned that under a new "hard look" processing policy, "carelessly prepared, unprocessable applications" would not be permitted to burden the processing system. 58 RR at 782. *See also FM applications*, 58 RR 2d 166 (1985) *(Public Notice)*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-110

In re Applications of

EMPIRE STATE BROADCASTING CORPORATION (WWKB) Buffalo, New York — File No. BR-840201WQ

For Renewal of License

BURSAM COMMUNICATIONS CORPORATION (WTHE) Mineola, New York — File No. BP-840430AC

For Construction Permit

Appearances

Roy Russo and *J. Brian DeBoice*, on behalf of Empire State Broadcasting Corporation (WWKB); *Keith E. Putbrese* and *Denise B. Moline*, on behalf of Bursam Communications Corporation (WTHE); and *Larry Miller*, on behalf of the Chief, Mass Media Bureau.

DECISION

Adopted: April 24, 1990; Released: May 14, 1990

By the Review Board: MARINO (Chairman) *, BLUMENTHAL, and ESBENSEN.

Board Member BLUMENTHAL:

1. The Board has before it the *Summary Decision*, 4 FCC Rcd 7008 (1989)(" *SD* "), [1] of Administrative Law Judge Joseph Chachkin ("ALJ") in the above-captioned case in which he granted the renewal application of Empire State Broadcasting Corporation ("Empire") [2] and denied the application of Bursam Communications Corporation ("Bursam"). The Board also has before it: (1) the exceptions to the *SD* filed by Bursam; (2) a reply to those exceptions filed by Empire; and (3) a reply to those exceptions filed by the Commission's Mass Media Bureau (or "Bureau"), a party to this proceeding.

BACKGROUND

2. The case before us is most unusual, and considerable background is useful to place the dispute in its proper context. We start with the elementary. Empire and Bursam both operate radio stations on "Clear Channel" AM broadcast frequency 1520 kHz: Empire's WWKB is a Class I-B, 50 kW facility licensed to Buffalo, N.Y.; Bursam's WTHE is a Class II facility licensed to Mineola, N.Y. Under Section 73.182(a)(1) of the Commission's Rules, 47 CFR § 73.182(a)(1), "Class I stations [such as WWKB] are dominant stations operating on clear channels . . . designed to render primary and secondary service over an extended area and at relatively long distances, hence have their primary service areas free from objectionable interference from other stations on the same and adjacent channels and secondary service areas free from objectionable interference from stations on the same channels." Under Section 73.182(a)(2), "Class II stations [such as WTHE] are secondary to stations which operate on clear channels . . . and [are] subject to such interference as may be received from Class I stations." Thus, WWKB, as a Class I "dominant" station is entitled to be free of objectionable interference in both its "primary" and "secondary" service areas from AM stations operating on the same frequency, while WTHE, as a Class II "secondary station" operating co-channel on 1520 kHz, must not only protect WWKB's extended service areas, it must also accept any interference it receives from WWKB (assuming the latter's operation in conformance with FCC technical standards). The 50 kW clear channel on 1520 kHz is specifically allocated to Buffalo, N.Y. under international treaty. *SD*, para. 80.

3. Although, over the years, the Commission has several times altered the basic conditions under which Class I clear channel stations may operate, *see, e.g., Clear Channel Broadcasting in the Standard Broadcast Band*, 31 FCC 565 (1961), *aff'd sub nom., Goodwill Stations, Inc. v. FCC*, 325 F.2d 637 (D.C. Cir. 1963); *Clear Channel Broadcasting in the AM Broadcast Band*, 78 FCC 2d 1345 (1980), *aff'd sub nom. Loyola Univ. v. FCC*, 670 F.2d 1222 (D.C. Cir. 1982), many clear channel interference protections remain on the books. One of those remaining protections, and the stricture at issue in this case, is set forth in Section 73.187 of the Commission's rules, which in part reads as follows:

> **Limitation on daytime radiation.**
>
> (a)(1) Except as otherwise provided in paragraphs (a)(2) and (3) of this section, no authorization will be granted for Class II facilities if the proposed facilities would radiate during the period of critical hours (the two hours after local sunrise and the two hours before local sunset) toward any point on the 0.1 mV/m contour of a co-channel U.S. Class I-A or I-B station, at or below the pertinent vertical angle determined from Curve 4 of Figure 6a of § 73.190, values in excess of those obtained as provided in paragraph (b) of this section.

All three parties here agree that Section 73.187 is a "go/no-go" provision, that is to say a rule that has never been waived, [3] as part of a generally rigid system of interference avoidance standards created in *AM Station Assignment Standards*, 45 FCC 1515 (1964), and "which culminated in a decision generally to abandon elaborate case-by-case evaluation in favor of strict adherence to specific rules defining the conditions when an application could be granted without causing objectional interference." [4] For an abbreviated discussion of the Commission's "go/no-go" system of AM broadcasting interference protections, *see ICBC Corp. v. FCC*, 716 F.2d 926 (D.C. Cir. 1983) (affirming denial of waiver of § 73.37(a), another "go/no-go" AM interference proscription). [5]

4. Nonetheless, relying on the precepts of *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), in which the court enjoined this agency to give a "hard look" to a requested waiver of its clear channel protection rules:

> Bursam filed its application for relaxation of critical hours, so that it may utilize the same power level -- 1 kW, during its entire broadcast day, which is from local sunrise to local sunset. Under its present license, Bursam must protect the 0.1 mV/m contour of Empire State's co-channel station WWKB by reducing power from its normal daytime power of 1,000 watts, to 250 watts during critical hours.

Exceptions at viii. In other words, Bursam sought a waiver of § 73.187 to permit it to operate at 1 kW during "critical hours" (*i.e.*, "the two hours after local sunrise and the two hours before local sunset") rather than at the reduced power of 250 watts to which it is restricted by the subject rule.

5. At about the same time that Bursam filed its request for a waiver of § 73.187, the regular license renewal application for WWKB was filed. Acting pursuant to delegated authority, the Assistant Chief of the Mass Media Bureau's Audio Services Division reviewed both Bursam's waiver request and Empire's routine renewal application, after which he held:

> Bursam, as an initial matter, requests a waiver of Section 73.187, purporting to show that objectionable interference is *de minimis* in nature. However, the standards Bursam proposes and the methods it uses to calculate interference are not those established by our Rules. Hence, we cannot accept them as valid grounds for waiver. Calculated according to our standards, interference to WWKB is substantial. Accordingly, Bursam's waiver request is hereby denied.

Hearing Designation Order, 2 FCC Rcd 2439 (1987). But despite the fact that Bursam's application was patently inconsistent with § 73.187, and a rule waiver denied, Bursam's application was "accepted for filing" and regarded as mutually exclusive with the renewal application of WWKB. Citing to the landmark case of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), a hearing to choose between the two AM broadcast applicants was ordered and the issues specified for hearing were:

> 1. To determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.
>
> 2. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

It should be here explained that Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(b), is a germinal statutory edict in the granting of broadcast station licenses and it demands that:

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

6. Some two weeks later, however, a revised *Hearing Designation Order*, 2 FCC Rcd 2793 (1987) (" *HDO* ") was promulgated to take into account the Commission's then-recent ruling in *Pillar of Fire*, 2 FCC Rcd 519 (1987), that henceforth it would subordinate Section 307(b) of the Communications Act to the question of whether a renewal applicant (such as WWKB here) was entitled to a "renewal expectancy" as against a competing applicant claiming to be better entitled under the tenets of Section 307(b). [5] Consequently, the revised *HDO* stated:

> In the absence of a waiver, Bursam's application would, if granted, effectively preclude the grant of WWKB's application for renewal of license. These two applications are therefore mutually exclusive within the meaning of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), and a hearing is called for to determine whether Empire State Broadcasting is entitled to a renewal expectancy, as discussed in *Pillar of Fire* (*WAWZ - FM*), 2 FCC Rcd 519 (1987) and, if not, which application would better serve the ends of Section 307(b) of the Communications Act of 1934, as amended.

The revised *HDO* therefore added a new issue "[t]o determine whether Empire State Broadcasting is entitled to a renewal expectancy." *Id.* The applications of Bursam and Empire were remitted to the ALJ for an evidentiary hearing on the four stated issues, as revised.

7. Two weeks after the issuance of the revised HDO, Bursam requested the ALJ to certify the HDO to the full Commission on its chief (and sustaining) complaint that the HDO utterly miscast the Section 307(b) issue as a flat a choice between (1) granting WTHE's request for a power increase during "critical hours" by (2) taking WWKB off the air entirely. The ALJ denied Bursam's certification request. *Memorandum Opinionand Order*, FCC 87M-1439, released June 26, 1987. Instead, Bursam insisted, the correct Section 307(b) election should not be "between WWKB's *continued* operation *and* [grant of] WTHE's proposed power increase," *see HDO*, 2 FCC Rcd at 2794 n.2 (emphasis added), a position it maintains to this very day. At oral argument, Bursam counsel reiterated:

> We wanted a waiver. Well, we wanted our application granted, but we didn't want WWKB to go off the air . . . . You will not find in any of the pleadings, or even in our argument, that WWKB should be taken off the air.

Tr. of Oral Arg. at 2031. Its exceptions claim that, in framing the Section 307(b) issue as an "either"/"or" proposition instead of a choice to grant *both* the WWKB renewal *and* WTHE's proposed power increase, "the Mass Media Bureau stacked the deck in both an unauthorized and unconstitutional manner in favor of Empire State, the renewal applicant." Exceptions at 5 (footnote omitted). Indeed, at oral argument Bursam counsel stipulated serveral times that, as the Section 307(b) issue was framed by the *HDO*, it could never have prevailed over Empire using a traditional and established Section 307(b) comparison, *e.g.*:

> [BOARD QUESTION]: I have a question to ask you. Do you feel that the way the issue was framed, the 307(b) issue, that you could have possibly prevailed on Section 307(b) grounds, traditional standards, 307(b) grounds.
>
> [BURSAM COUNSEL]: If you mean, that is, only one or the other application can be granted, no. We --
>
> [BOARD QUESTION]: It was a foregone conclusion.
>
> [BURSAM QUESTION]: I agree with you on that . . . .

Tr. of Oral Arg. at 2030-2031; *see also id.*, at 2041; Exceptions at 6 (complaining of "impossible burden of showing that its gains, albeit sizeable, during critical hours, outweigh the total loss of service of WWKB"). A cursory examination of para. 77 of the *SD* will reveal the character and consequences of a conventional Section 307(b) analysis:

> 77. A comparison of WWKB's extensive existing service -- which would be destroyed if Bursam's application were to be granted -- with the comparatively insignificant proposed increase in WTHE's service illustrates the inherent inefficiency of spectrum utilization which would result from the Bursam proposal:
>
> | **Existing WWKB Service Which Would Be Destroyed** | **Proposed WTHE Service To Be Gained** |
> |---|---|
> | 1. Loss of primary service during *all daytime hours* to 1,487,437 persons in a 5,370 square mile area; | 1. Gain of primary (2.0 mV/m) service to 617,717 persons in a 225.3 square kilometer area *during only the four critical hours* each day. |
> | 2. Loss of interference free intermittment service of during *all daytime hours* to an additional 449,657 persons in a 7,393 square mile area; | |
> | 3. Loss of primary service during *all nighttime hours* to 1,487,437 persons in a 5,370 square mile area; and | |
> | 4. Loss of skywave service during *all nighttime hours* to 55,652,493 persons in a 214,121 square mile area. | |
>
> Empire State Ex. 4, Table 4; Bursam Ex. 2 at 12 & Table VI. Any such trade-off would amount to the antithesis of efficient distribution of radio facilities [under Section 307(b)].

8. Empire also experienced an early disagreement with the ALJ. Although, pursuant to *Pillar of Fire*, the revised *HDO* afforded it an opportunity to seek a "renewal expectancy" which, if granted, might well take precedence over any Section 307(b) preference (hypothetically) accruing to Bursam, Empire sought instead from the ALJ a summary decision on the Section 307(b) issue. When the ALJ refused, and held that he wished to first hear the "renewal expectancy" issue, Empire appealed to the Board. Holding that the ALJ had broad discretion to order the taking of evidence at hearing, and opining that resolution of the Section 307(b) issue might obviate the need for further comparison of the two applicants, *see FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955), we advised in *Empire State Broadcasting Corp.*, 2 FCC Rcd 7554 (Rev. Bd. 1987) (" *Appeal Order* "), *erratum*, 3 FCC Rcd 313 (1988), that the ALJ was free to hear the Section 307(b) issue prior to holding a full evidentiary hearing on the "renewal expectancy" issue, a much more subjective inquiry by far. *See Monroe Communications Corp. v. FCC*, No. 89-1092 (D.C. Cir. April 10, 1990) (and concurring statement of Silberman, J.). Remarkably, and as we observed in our *Appeal Order*, Empire's motion to resolve, if possible, the Section 307(b) issue prior to the "renewal expectancy" issue was opposed by Bursam, [7] which stood absolutely nothing to gain under the "renewal expectancy" issue. *Pillar of Fire; see also Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984) (applicant not entitled to "renewal expectancy" then compared to any competing applicant on other conventional selection criteria, including Section 307(b) where approporiate).

WAIVER

9. In reviewing Empire's appeal from the ALJ's declination to proceed forthwith on the Section 307(b) issue, the Board was passingly puzzled as to why Bursam's application, which was patently inconsistent with § 73.187 of the rules, was even "accepted for filing" by the Mass Media Bureau, and also as to whether, without a *waiver* of that rule, its application could be granted insofar as it conflicted with a clear channel, 50 kW operation on 1520 kHz, as protected by international treaty. Our *Appeal Order* considered that § 73.187 is a general technical interference rule, carrying the force of federal law; and that under the express terms of that rule "no authorization will be granted for Class II facilities if the proposed facilities would radiate during the period of critical hours . . . " any power exceeding that permitted to WTHE by other portions of that rule. We further noted that previous applications to operate in a manner patently inconsistent with clear channel rule protections were scrutinized at the threshold to determine whether a waiver was warranted. *Appeal Order*, 2 FCC Rcd at 7556, citing *Hubbard Broadcasting, Inc. v. FCC*, 663 F.2d 220 (D.C. Cir. 1980); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972) (waiver denied after remand). It was our perception as well that, unless a threshold waiver of § 73.187 was granted, or the waiver request itself presented a substantial and material question of fact requiring a hearing to adjudicate that *particular* waiver request, that AM broadcast applications in patent conflict with an extant clear channel interference rule will be summarily returned as "unacceptable for filing" under § 73.3566(a) of the Rules, which holds:

> **DEFECTIVE APPLICATIONS**
>
> (a) Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed. Requests for waiver shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof.

Here, the *HDO* rejected Bursam's waiver request, did not add a special waiver issue, *see, e.g., James S. Rivers, Inc. v. FCC*, 351 F.2d 194 (D.C. Cir. 1965) (special issue added to determine whether applicant entitled to waiver of § 73.28(d)(3)) (*not* to be confused with *James River Broadcasting Corp., infra*), and the Board pondered the question of why Bursam's application was "accepted for filing" and set for comparative hearing as against Empire's renewal application when Rule § 73.187 had not been waived and appeared to be in full force so as to *preclude* the necessity of individualized, case-by-case adjudication. For:

> In this manner, one of the foremost advantages of Rule Making -- the formulation and effectuation of agency policy with a minimum expenditure of time and resources -- will not be undermined by the necessity for continuous case-by-case adjudication.

Basic Media, Ltd. v. FCC, 559 F.2d 830, 833 (D.C. Cir. 1977) (internal citation omitted) (application in patent conflict with FM "go/no-go" rule, and waiver request, rejected; no hearing against compliant renewal applicant ordered).

10. However, it was the Bureau's position (and remains so, *see* Bureau Reply at 6-8 & n.8 and note 8 *infra)* that, irrespective of its unconditional denial of a waiver of § 73.187 to Bursam, the overpowered WTHE application was not subject to summary dismissal under § 73.3566(a) because it is Bursam's patent conflict with § 73.187 that *makes it* mutually exclusive with Empire's renewal application, thus compelling an individual adjudication under *Ashbacker* on a Section 307(b) issue. Or, put another way, the Bureau contended that, *but for* § 73.187, Bursam's request for increased power during "critical hours" would not create objectionable interference to WWKB, and therefore *both* WWKB's renewal application *and* WTHE's increased power application could be granted together. It elaborates its view that "Bursam was not required to seek a waiver" of § 73.187, because its (otherwise patently defective) application was filed during a "renewal window," and that during "renewal windows" rules such as § 73.187 and other "'go/no-go' rules . . . were temporarily suspended . . . to allow the filing of Bursam's mutually exclusive application . . . ." [8] In response to cases such as *Hubbard Broadcasting*, where the Commission summarily rejected an AM broadcast application that was inconsistent on its face with our clear channel rules, and the agency did not designate the conflicting applications for mutually exclusive hearing on Section 307(b) grounds, the Bureau believes that *Hubbard Broadcasting* involved a different kind of rule (*i.e.*, § 73.22, assigning AM frequency 770 kHz to New York City as a Class I clear channel), and that therefore Hubbard's request for a Class I station in New Mexico was subject to summary rejection under § 73.3566, even though filed during the "renewal window" as against the renewal application of Class I WABC, New York City. [9] In sum, the Bureau's position was (and is) that, although § 73.187 did not render Bursam's application "unacceptable for filing" since it was filed during a "renewal window," and no grounds for waiver need be shown to entitle Bursam to a comparative hearing on Section 307(b) grounds, the outcome of that statutory issue may only be a grant of Bursam's application in conflict with § 73.187 by taking WWKB off the air entirely, a result Bursam has lately disavowed and a Section 307(b) burden Bursam laments is "impossible."

11. Still, and with all due respect, the Board was (and remains) uncertain that a distinction can be drawn between cases such as *Hubbard Broadcasting* and the instant situation: both § 73.22 and § 73.187 are general rules intended to preclude objectionable interference on clear channel frequencies in the AM broadcast band. *See also ICBC Corp. v. FCC, supra* (rule § 73.37(a)). And merely because Bursam's application was filed during a "renewal window" (as was Hubbard's, above), the Board found it difficult to accept that -- without a waiver -- Bursam's application was "acceptable for filing" within the purport of § 73.3566, and automatically entitled to an individualized adjudication on a Section 307(b) issue. Indeed, the Board portended that if our entire panoply of painfully crafted "go/no-go interference rules were considered "temporarily suspended" during a "renewal window," all of the Commission's laborious Rule Making efforts from

1964 on were considerably for naught, to the extent that the Commission thought it had determined to thereafter prevent interference in the AM band by rule rather than by case-by-case adjudication under Section 307(b). [10] And, we remarked, if the Bureau were correct that the Commission's carefully crafted broadcast interference rules (in the AM band; or FM, or TV) were considered "suspended" during "renewal windows," the administrative implications were enormous, [11] since any application proposing objectionable interference to a renewal applicant -- even if that application were patently inconsistent with, *e.g.*, an FM or TV mileage separation rule -- would be regarded as "acceptable for filing" and entitled to mutually exclusive consideration under Section 307(b), with a narrow choice to grant the non-compliant application by removing the compliant applicant from the air entirely. But it had been the Board's experience that applications in patent conflict with a "go/no-go interference rule (unless presenting the distinct potential for a waiver) are summarily rejected as "unacceptable for filing," and no *Ashbacker* hearing ordered, even if the conflicting application is filed during a "renewal window." *See , e.g., Basic Media, Ltd. v. FCC, supra* (short-spaced FM application summarily rejected; no § 307(b) hearing against renewal applicant); *see generally North Texas Media, Inc. v. FCC, supra* note 5 (same for new applicant; no comparative hearing permitted on § 307(b) grounds, or otherwise). In fact, as pointed out in Empire's pleadings, the court in *James River Broadcasting Corp. v. FCC*, 399 F.2d 581, 582-583 (D.C. Cir. 1968) (footnote omitted), [12] observed without disapprobation that the Commission had there rejected as "unacceptable for filing" an application because:

> In summary, we find that, since the proposal as originally tendered violated Section 73.187, it was "patently not in accordance with the Commission's Rules" within the meaning of Section 1.566 and was properly returned as unacceptable.

12. Based upon its appreciation of the dynamics of the Commission's system of "go/no-go" rules, and the apparent thrust of precedent, the Board at that juncture assumed a waiver codicil to be implicit in the instant *HDO*. At the same time, the Board was keenly aware of two controlling factors: (1) that the *HDO* had considered and rejected Bursam's waiver request on the technical engineering arguments made to the Bureau; and (2) that where an *HDO* has fully considered and rejected a proposition, the Board is not at liberty to second-guess or to act in any manner inconsistent with that *HDO*. *See Atlantic Broadcasting Co.*, 5 FCC 2d 717, 721 (1966) (where *HDO* sets forth reasons, Board must act consistently); *Frank H. Yemm*, 39 RR 2d 1657, 1659 (1977) (same if *HDO* issued by delegated authority). Because Bursam's application remained patently inconsistent with § 73.187, and inasmuch as the *HDO* had denied Bursam a waiver on the technical engineering grounds presented, the Board assumed that the situation might be similar to that occurring in *Thomas Radio Co. v. FCC*, 716 F.2d 921, 925 (D.C. Cir. 1983) (emphasis added), where the Bureau had denied an applicant's waiver request on the technical grounds presented to it, "but it did not foreclose applications for waivers *based on other considerations*." Thus, our *Appeal Order* did not foreclose Bursam from making a waiver argument not considered and rejected in the *HDO*. *See Appeal Order*, 2 FCC Rcd at 7558 n.16. Pursuant to that perception, the ALJ considered various arguments by Bursam in favor of a waiver of § 73.187, *see SD*, paras. 16-56, rejected others, *see* Exceptions at 7-41, and concluded that Bursam had not shown good public interest grounds for a waiver. *See SD*, paras. 58-72.

13. In its pleadings now before us, the Bureau continues to urge that no threshold waiver of § 73.187 was necessary to have entitled Bursam to a Section 307(b) hearing as against Empire's renewal application, and that the formulation of the Section 307(b) issue in the *HDO* was the correct and singular formula available to Bursam. In support, it cites *KPLT, Inc.*, 1 FCC 2d 961 (1965), where a Class II, daytime-only AM station (KTXO) filed an application to increase its power from 250 W to 1 kW at the same time as an adjacent frequency applicant (KPLT) sought a renewal of its license. Finding that the KTXO application was inconsistent with § 73.37(a), but denying its requested waiver, the Commission, citing *Ashbacker*, considered the conflicting applications to be mutually exclusive and designated them for comparative hearing. However, recalling that the purpose of its 1964 Rule Making was to avoid the weighing of relative service gains and losses that had characterized its pre-1964 proceedings, the Commission stated:

> In taking this action, the Commission wishes to make one thing clear. *In the proceedings to follow, the issues involved will not permit the weighing of gains in service area and population by KTXO against the potential loss of listeners incurred by KPLT if both applications were to be granted.* This method was traditionally employed in hearings under the former technical standards when interference to an existing licensee was indicated. *In the case at hand, since we have found the two applications to be mutually exclusive, the Commission will decide whether to take KPLT off the air while permitting KTXO to increase power or, on the other hand, the ends of Section 307(b) would be better served by renewing the license of KPLT and requiring KTXO to operate at its present power.*

1 FCC 2d at 964 (emphasis added). The Bureau claims that Bursam's posture is identical to the non-compliant applicant in KPLT, Inc., and that Bursam cannot obtain a waiver of § 73.187 through a "comparison of relative gains and losses" as Bursam desires (Exceptions at 5-6 & n.17) because:

> Bursam's attempt to turn back the clock more than 25 years and have the predicted gains from its proposal compared to the predicted losses from Empire State's service should be rejected. Throughout this proceeding Bursam has contended that the Commission's rules should not apply to it. As stated in the SD, Bursam's attacks on the Commission's rules in general and Section 73.187 in particular should be made in the context of a Rule Making proceeding. Neither the Presiding Judge nor the Review Board has the authority to turn back the hands of time and grant Bursam the relief it seeks.

Bureau Reply at 7. It also contends that Bursam's technical waiver showings at hearing were either (1) an attack on the essential validity of § 73.187, (2) inconsistent with the measurement requirements of the rule, or (3) fully considered and rejected by the Bureau in the waiver request denied in the HDO. *See* Bureau Reply at 13-18. And it urges that Bursam's non-technical (i.e., programming and EEO) showings were insufficient to support a waiver, id., at 10-12, even if Bursam were permitted to seek a rule waiver under the strict terms of the HDO, instead of forcing WWKB off the air entirely.

14. For its part, Empire's exceptions do not directly argue that Bursam's application should have been summarily dismissed as "unacceptable for filing," once the Bureau denied a waiver of § 73.187. Although at oral argument Empire counsel did advert to a "philosophical complaint with the acceptance for filing," Tr. of Oral Arg. at 2008, Empire appears content to have it compared against Bursam under Section 307(b), but only in accordance with the formulation of that issue as reflected in the *HDO* (mirroring the formulation in *KPLT, Inc.*). It does not dispute Bursam's complaint that, under the issue as formulated, Bursam could never have prevailed on traditional Section 307(b) grounds, and Empire counsel stated:

> In this case, given the proposal they made, I don't think it is possible. I don't think it's ever been possible, which is why I think this hearing never should have taken place. So I think the Bureau should have refused to designate it for hearing. I think that action would have been sustained in the courts.

Tr. of Oral Arg. at 2016. It does argue, as does the Media Bureau, that Bursam cannot and should not be permitted to seek a waiver of § 73.187 by showing relative gains and losses if both applications were granted; and it rejects Bursam's most recent postulate that, under Sections 304 and 309 of the Communications Act, Bursam need *not* seek a waiver for WTHE during a "renewal window" to have its application granted *along with* the renewal application of WWKB. Empire responds directly to Bursam's specific exceptions by asserting:

> Bursam has never coherently articulated precisely what legal theory underlies its unusual notion that the Commission's technical and allocations rules temporarily lose their force during renewal "windows." As Empire State understands it, however, Bursam's contention may be restated, not unfairly, as follows: Sections 304 and 309(h) of the Communications Act prohibit licensees from obtaining any "vested right" to the use of spectrum. *See* Bursam Brief at 6 n.17 & 44-46. At license renewal time, therefore, Bursam reasons, the spectrum formerly utilized by a renewal applicant must be made available -- both in whole and also in part -- for comparative challenge, in hearing, by competing applicants. This is required, Bursam claims, by Sections 304 and 309(h), and also by the hearing requirement of Section 309(e) of the Act, as explicated in *Ashbacker*. *See* Bursam Brief at 4-6, 44-46 & n.17. In the license renewal context, Bursam apparently argues, the Commission cannot give any force or effect to technical rules which would accord absolute or presumptive protection to spectrum formerly utilized by a renewal applicant, because to do so would create a forbidden "vested right" in such spectrum. *See Id.* From this it follows, Bursam seems to reason, that all technical or interference rules -- including Section 73.187 -- which afford absolute or presumptive protection to spectrum use must be deemed "temporarily inoperative" during renewal windows. *See id.* at 2 n.7. This means, Bursam contends, that a comparative renewal challenger such as Bursam cannot be required to seek a waiver of what are "temporarily inoperative" spectrum protection rules such as Section 73.187. *Id.* at 6 & 26. Instead, Bursam concludes, the correct procedure is merely to balance proposed gains against proposed losses, *seeid.* at 45-46, because that is, Bursam apparently believes, the most appropriate means of comparing the competing proposals -- given the earlier posited *absence of any decisional guidance from the Commission's " temporarily inoperative " technical rules* . . . . Bursam cites no Commission or Court decision interpreting Sections 304 and 309(h) of the Act in the striking manner which Bursam proposes, and for good reason: No such decisions exist. There is, also, a very good reason *why* no such decisions exist. Any such interpretation of the Act would effectively destroy the Commission's ability to resolve spectrum allocations issues by generic rule making.
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> * * *
>
> From Bursam's contentions regarding Sections 304 and 309(h) of the Act, it would follow (as Bursam blithely concedes) that all generic technical and allocations rules must be stripped of their presumptive validity and made subject to complete *de novo* reconsideration in the context of every comparative renewal hearing conducted.

Empire Reply at 20-22 (emphasis in original). [13] Nevertheless, it agrees with the Media Bureau that Bursam's waiver showings were insufficient in any event. *See id.*, at 3-18.

15. Finally, Bursam's positions on the matter of a waiver of § 73.187 are both confused and confusing: Its pleading first acknowledges that its application sought no more than a waiver of the rule to increase its power to 1 kw during "critical hours," *see supra* para. 4 (quoting Exceptions at viii). And yet, while it allows that the Board's *Appeal Order* "directing that Bursam be permitted to submit other evidence in support of a waiver was the equivalent of removing the blindfold" (Exceptions at 5), it paradoxically declares:

> Bursam submits that to *require* it to ask for a waiver of the rules, in order even to get an opportunity to have its case heard, is a violation of *Ashbacker* and puts unequal burden on Bursam. To hold, as the ALJ did, that Bursam has the choice of assuming the very "heavy burden of demonstrating that it is entitled to a waiver of Section 73.187 of the Commission's Rules," *S. D.*, ¶ 71, or the impossible burden of showing that its gains, albeit sizable, during critical hours, outweigh the total loss of service

> of WWKB, is to impose a Hobson's choice on a renewal challenger, and pervert the burdens and presumptions that would ordinarily obtain in a comparative renewal proceeding. To structure the comparison in the manner set forth in the *HDO* is to invest a renewal applicant with a presumptive right to renewal of license, which is forbidden by the Act, and which Empire State was required by law to eschew when it became the licensee of WWKB.

Id., at 6 (emphasis in original; footnote omitted). But, it will be recalled (*see supra* para. 7) that Bursam counsel at oral argument again contended that all it has ever sought was a waiver of the rule. Then after arguing in its exceptions, at one point, that "to *require* it to ask for a waiver of the rules" violates its *Ashbacker* rights, Bursam goes on to claim that it is entitled to a waiver on the strength of its "good" programming and its EEO record (Exceptions at 7-24), and its technical arguments (*see id.*, at 24-29; 36-41). Indeed, Bursam goes even further and urges the Board itself to take "official notice" that § 73.187, promulgated in 1959, no longer serves the public interest (Exceptions at 30-36), and to factor that conclusion into its waiver request.

16. *Discussion*. After considering all of the foregoing, and conceding that it was the Board's *Appeal Order* that (perhaps improvidently) "assumed" that Bursam might be permitted at hearing to seek a waiver of § 73.187, the Board will not act on Bursam's waiver request. To put it plainly, "the matter does not appear to us now as it appears to have appeared at the time." [14] In the aftermath of the hearing, as well as our study of the pleadings and their cited authorities, several reasons constrain us to backtrack. First, it is now more clear that the *HDO* did not contemplate any sort of waiver of § 73.187, but specifically followed the formula of *KPLT, Inc.*, in demanding a flat choice to grant either a power increase to WTHE or the license renewal of WWKB, but not both. Under *Atlantic Broadcasting* and *Frank H. Yemm*, the Board now considers itself bound firmly by the *HDO* formulation. [15] Second, though related, is Bursam's concession that, "[i]f the Board feels it is bound by *KPLT*, " it has no institutional authority to grant a waiver. *See* Tr. of Oral Arg. at 2038-2041. But third, and perhaps most important, the *WAIT Radio* court declared that "[s]ound administrative procedure contemplates waivers . . . granted *only* pursuant to a relevant standard . . . [which is] best expressed in a rule that obviates disciminatory approaches." 418 F.2d at 1159 (emphasis added). However, we are now informed by all three parties that § 73.187 has *never* been waived, a fact we were unaware of at our *Appeal Order* stage, and it therefore appears that the Commission has never developed or articulated standards upon which to base a waiver of the subject rule. *Compare, e.g., Edens Broadcasting, Inc., supra* note 15, where a waiver issue was expressly designated and the Board measured a request for waiver of an FM short-spacing rule in accordance with carefully developed waiver standards. 2 FCC Rcd at 693. As the court recently reminded in *Northeast Cellular Telephone Company, L. P. v. FCC*, 897 F.2d 1164 (D. Cir. 1990), it may be chancy to grant a waiver where the Commisison has "never stated any [waiver] standards in the first place." For these three reasons, the Board will not address the merits of the waiver arguments, but will first permit the full Commission an opportunity to ennuciate any standards for waiver of § 73.187, since the Board has no delegated public policy role.

SECTION 307 (b) ISSUE

17. In light of the fact that Bursam concedes (indeed *insists)* that it cannot prevail over Empire on the Section 307(b) issue as formulated in the *HDO*, there is little purpose in reviewing the findings and conclusions of the ALJ on this issue. For interests of clarity, however, the ALJ compared the two applications before us on Section 307(b), in accordance with the venerable principles of *Kent - Ravenna Broadcasting Co.*, 22 RR 2d 605 (1961). In short, he concluded that WWKB provides "primary" service at night to more than 23,000 persons living in "underserved" (fewer than 5 aural services) areas, while the proposed WTHE application would fail to reach areas not now receiving at least 23 aural services. Thus, he found a dispositive "reception" preference for WWKB. *SD*, paras. 74-75. He also found WWKB preferred under *Kent - Ravenna's* "efficient distribution" criterion, *SD*, paras. 76-77, and on the "transmission" service standard. *Id.*, para. 78. Lastly, he considered that WWKB, which has been in service for over 60 years, would continue "to preserve the United States' reserved right to use of 1520 kHz in Buffalo as a 50 kilowatt clear channel station under international frequency allocation agreements." *Id.*, paras. 79-80, citing *Pasadena Broadcasting Co.* v. FCC, 555 F.2d 1046 (D.C. Cir. 1977). Our affirmation of the ALJ on this issue, as anticipated by both Empire and Bursam, is a foregone conclusion. Any other result would fly in the face of Section 307(b).

CONCLUSION

18. Having affirmed the SD on the Section 307(b) issue, as designated, and having declined to reach the competing waiver arguments for the reasons explained in para. 16, *supra*, the Board's role is at an end. We recognize that Bursam's waiver arguments were proffered in response to the Board's *Appeal Order*, but apprehend now that our prior order may have been improvident in that regard insofar as *KPLT, Inc.* remains good law. [16] Yet to the extent that Bursam contended at oral argument that it elected to pursue this evidentiary hearing solely to preserve its appellate right to argue (1) the impropriety of the HDO formulation of the 307(b) issue, and (2) its entitlement to a waiver of § 73.187, Tr. of Oral Arg. at 2031-2032, there is now a formal record of its case. The Commission shall have before it Bursam's perfected arguments, the counter-arguments of Empire and the Bureau, and all of the probative evidence considered at hearing. The Commission will also have the reasoning of the ALJ in denying the waiver.

19. ACCORDINGLY, IT IS ORDERED, That the application of Bursam Communications Corp. (File No. BR-540201WQ) for renewal of license for AM broadcast Station WWKB, Buffalo, New York IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

* Chairman Marino was not present at oral argument. However, pursuant to 47 CFR § 0.361(c), he has read the transcript of oral argument and joins in the Board's decision.

[1] While the ALJ styled his order as a *Summary Decision*, it is not strictly speaking "summary" within the meaning of Section 1.251 of the Commission's rules, 47 CFR § 1.251, since a full hearing was held on the Section 307(b) issue as designated. *See* Bureau Reply at 20 n.10. Nevertheless, for the purpose of simplicity, we will refer to the ALJ's decision as " *SD*. "

[2] The renewal application for WWKB was originally filed by its prior licensee, Capital Cities Communications, Inc., but its successor Empire State has succeeded to its interests. *Empire State Broadcasting Corp.*, 2 FCC Rcd 2793, 2794 n.1 (1987).

[3] *See* Bureau Reply at 5-6; Empire Reply at 8-9; Tr. of Oral Arg. at 1992 (Bursam counsel).

[4] Bureau Reply at 6.

[5] Without oversimplification, and whereas the Commission's 1964 *AM Station Assignment Standards* sought to limit objectionable interference amongst AM broadcast stations by "go/no-go" rules such as § 73.37(a) and § 73.187 through limits on power and hours of operation, it chose essentially a "mileage separation" system for FM broadcast stations, and waivers of the rules implementing that interference system are nearly as tightly controlled as the AM "go/no-go" rules. *North Texas Media, Inc. v. FCC*, 778 F.2d 28 (D.C. Cir. 1985); *Basic Media, Ltd. v. FCC*, 559 F.2d 830, 834 (D.C. Cir. 1977). Interference amongst TV stations is, like FM radio, also controlled by a "mileage separation" system, and waivers of those implementing rules are equally hard to come by. *WITN - TV, Inc. v. FCC*, 849 F.2d 1521 (D.C. Cir. 1988).

[6] In so doing, the Commission was heeding the court's suggestion in *Beaufort County Broadcasting Company v. FCC*, 787 F.2d 645, 654 n.7 (D.C. Cir. 1986), that:

> In *Pillar of Fire*, a renewal proceeding was at issue, and the existing expectations and proven record of the license, considerations not present in an initial licensing such as the one before us, may have counseled the FCC to exercise its discretion to deemphasize § 307(b) considerations in order to serve the public interest.

[7] 2 FCC Rcd at 7557 n. 12. We there noted Bursam's curious claim that an initial comparison of it with Empire on Section 307(b) grounds would raise "serious questions about the continuing integrity of the Commission's comparative hearing process and the rights guaranteed under *Ashbacker*. " If Bursam's complaint was there "curious," it has now blossmed into the positively bizarre, since Bursam's exceptions now just as stridently contend that any consideration of a "renewal expectancy" for WWKB would likewise deprive it of its *Ashbacker* rights. Exceptions at 4-5 ("The *HDO*, for example, attempted to create a bifurcated hearing by conditioning the right to *any* sort of comparative hearing on whether Empire State was entitled to a renewal expectancy, in express violation of the Ruling by the Federal Circuit Court of Appeals in *Citizens Communications Center v. FCC*, 463 F.2d 822, 24 RR 2d 2045 (D.C. Cir. 1972); *see also*, *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).") (footnote omitted; emphasis in original). Because no "renewal expectancy" issue was here tried, and we dispose of the case on the Section 307(b) issue, we leave Bursam's inconstancy to itself.

[8] Bureau Reply at 19. At oral argument, however, Bureau counsel partially retracted its contention that "go/no-go" rules, including § 73.187, are "temporarily suspended" during "renewal windows." Bureau counsel stated:

> I look back at the Bureau's reply and exceptions, and we used some language in there that may have been perhaps some poor choice of words in saying it was a temporary suspension of rules during the renewal window.
>
> I think that has caused some concern and problems here. In reality, it's not really a suspension of the rules, but . . . during the renewal window, an application which would be otherwise ungrantable may be accepted for filing because it is mutually exclusive with the renewal application, and that is what I meant by that poor choice of words, is that the rules are not suspended, they do not disappear, they do not go away; but that they -- during a renewal window, such an application, which would be in violation of the rules, otherwise may be accepted for filing.

Tr. of Oral Arg. at 2019.

[9] At oral argument, Bureau counsel again distinguished *Hubbard Broadcasting*, where a wavier was held to be required before the renewal challenger was entitled to a Section 307(b) hearing, based on the contention that the rule involved there (§ 73.22(a)) assigned the AM frequency at issue (770 kHz) to New York City, and that Hubbard's request for Class I status for its New Mexico station was properly rejected without a Section 307(b) hearing. *See* Tr. of Oral Arg. at 2022-2025. We are unsure of this rationale: both § 73.22 and § 73.187 (like § 73.37(a)) appear to be part of the same "go/no-go" system intended to preclude interference on AM clear channels, and either rule can be waived (presumably) on a strong public interest showing. 47 CFR § 1.3. Nor, with all due respect, do we accept the Bureau's hypothesis that it is § 73.187 that *makes* Bursam's non-complying application mutually exclusive with Empire's renewal application, and that *but for* the rule there would be no objectionable interference and thus no mutual exclusivity. That is undoubtedly true with respect to *every* FCC "go/no-go" rule. It is not the rule that creates mutual exclusivity, but the interference that would come of a non-compliant proposal; and it is the objectionable interference that all "go/no-go" rules were designed to obviate on a universal basis, without the need to resort to case-by-case adjudications under a § 307(b) issue. In that respect, § 73.187 is, to our current way of thinking, conceptually indistinguishable from any other "go/no-go" rule, AM, FM, or TV.

[10] As the court expounded in *ICBC Corp. v. FCC*, upholding the denial of a waiver of AM "go/no-go" rule § 73.37(a):

> The Commission relied on its policy of rigid application of the "go/no-go" aspect of the signal contour rule, 47 C.F.R. § 73.37(a). The Commission has consistently applied that policy since its adoption in 1964, *see Newcastle Broadcasting Corp.*, 11 FCC 2d 523 (1968) (rejecting application when assumption that there was "no prohibited overlap," made at time application had been accepted for

filing, was found to be false); *Major Market Stations, Inc.*, 4 Rad. Reg. 2d (P & F) 650 (1965) (noting "over-all policy of strict enforcement" of section 73.37(a)), making exceptions to section 73.37(a) only in cases where contour overlap was truly *de minimis* or where the signal contour of the existing station was already overlapped by another station's contour.

* * *

It is clear, therefore, that the "go/no-go" policy supports the denial of waiver. If the FCC's adherence to that policy is valid, the denial of waiver must be upheld.

The FCC's policy . . . is a rational implementation of the FCC's statutory mandate to "[m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations." 47 U.S.C. § 303(f) (1976). The policy of refusing to consider "non-technical" reasons for waiver of section 73.37(a) -- such as arguments relating to "primary service" or to minority ownership and service -- was based on the FCC's well-supported conclusion that considerable confusion had resulted from the agency's contrary policy prior to 1964. The pre-1964 experience provides a rational basis for the "go/no-go" policy, and that is all that is necessary.

716 F. 2d at 929-930.

[11] Our *Appeal Order* remarked:

We recognize that Bursam's request for a waiver of Section 73.187, based upon its own impermissible method of calculating objectionable interference, was denied in the revised *Hearing Designation Order* . . . Nevertheless, we must assume from the fact that the Mass Media Bureau designated Bursam's patently defective application for comparative hearing that it did not intend to preclude Bursam from adducing one or more *different* public interest arguments in favor of a waiver, and to present those in the context of the Section 307(b) issue, where its waiver arguments shall be given a "hard look." Indeed, no other assumption is possible, unless we proceed from the hypothesis that -- during the renewal "window" -- the Commission's technical rules, carefully developed to preclude objectionable interference and carrying the force of law (*e.g.*, limitations on maximum power, transmitter location, antenna height, *etc.*) are temporarily inoperative. The ramifications of such a postulate are indeed sweeping, if applied universally to all technical rule limitations and to all broadcast services. A delegated authority, such as the Board, would not unilaterally proceed on so revolutionary an assumption.

2 FCC Rcd at 7558 n.16 (emphasis in original).

[12] The omitted footnote recited former § 1.566 (now recodified as § 73.3566), and which read:

47 C.F.R. § 1.566(a) (Supp.1968): Applications which are determined to be patently not in accordance with the Commission's rules, regulations or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing. * * *

It is true that the Commission was reversed in *James River Broadcasting Corp.*; but not because it *rejected* the patently defective application "in view of its patent conflict with § 73.187." Rather, the Commission was reversed there because it refused to permit the non-compliant applicant to *amend* its application to *remove* the patent conflict with § 73.187. Admittedly, however, the non-compliant application does not there appear to have been filed during the "renewal window" of the Class I station entitled to protection under § 73.187, KFAB, Omaha, Nebraska.

[13] Empire's Reply (at 2) had earlier mused (emphasis added; footnotes omitted):

In particular, Bursam avows that -- notwithstanding the Review Board's contrary view -- Congress intended Section 309(e) of the Communications Act to render the Commission's entire scheme of technical and allocations rules "temporarily inoperative" during renewal "windows." Because the Board has already rejected this "sweeping" (to put it charitably) notion, it would appear unnecessary (although not uninteresting) to rebut it with extended argument here. Neither Section 309(e), as interpreted by *Ashbacker*, nor any other provision of law requires the chaos that would inevitably ensue from the unbridled and plenary consideration during renewal "windows" of any variety of technical proposal which can be conceived by the mind of man.

Compare supra note 11, where we speculated to the same effect in our *Appeal Order*.

[14] *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950) (Jackson, J., concurring) (paraphrase, quoting Baron Bramwell in *Andrew v. Styrap*, 26 L.T.R. (N.S.) 704, 706).

[15] *Compare, e.g., Edens Broadcasting Inc.*, 2 FCC Rcd 689 (Rev. Bd. 1987), *aff'd*, FCC 90-126 (*Public Notice* (Report No. DC - 1604) released April 12, 1990), where the hearing designation order expressly included an issue to determine whether our FM short-spacing rules should be waived.

[16] Although *KPLT, Inc.* has never been directly overruled, it appears to have spawned no progeny; and so far as the Board can determine that case itself has no recorded history beyond the hearing designation order referenced by the Bureau. In the wake of this proceeding, we recall again the court's suggestion in *Hubbard Broadcasting* that:

We see no reason why the Commission may not, in the exercise of its regulatory authority and discretion, choose to except clear channel breakdowns from its general practice of AM station assignment by adjudication, particularly given the unique problems that obtain in the clear channel context.

663 F.2d at 223 n.2.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-170

In re Applications of

TRACY A. MOORE D/B/A GIFFORD ORION BROADCASTING, LTD. (hereafter "Orion")	File No. BPH-880308MK
MEDIA ONE, INC. (hereafter "Media One")	File No. BPH-880309MB
JOHN E. MORRIS AND LAURENCE R. BAKER D/B/A MORBAK COMMUNICATIONS (hereafter "Morbak")	File No. BPH-880309ME
AMERIWAVE, INC. (hereafter "Ameriwave")	File No. BPH-880309MF
GONZO COMMUNICATIONS, LIMITED PARTNERSHIP (hereafter "Gonzo")	File No. BPH-880310MD
JIANT BROADCASTING, INC. (hereafter "Jiant")	File No. BPH-880310ME
PRESS BROADCASTING COMPANY (hereafter "Press")	File No. BPH-880310MK
MOLLY BEARD BROADCASTING, LTD. (hereafter "Beard")	File No. BPH-880310MS
ANA R. AVELLO (hereafter "Avello")	File No. BPH-880310NG
TRIPLE H BROADCASTING, INC. (hereafter "Triple H")	File No. BPH-880310NJ
HARLAN COMMUNICATIONS (hereafter "Harlan")	File No. BPH-880310NK
RONNIE L. MAYES (hereafter "Mayes")	File No. BPH-880310NL
RONALD CRIDER (hereafter "Crider")	File No. BPH-880310NT
GWENDOLYN G. ROWLAND (hereafter "Rowland")	File No. BPH-880310NH (DISMISSED HEREIN)

For Construction Permit for a
New FM Station on Channel 234A (94.7 MHz) in
Gifford, Florida.

HEARING DESIGNATION ORDER

Adopted: March 13, 1990; Released: May 14, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters*. On October 16, 1989, Media One filed a petition for voluntary dismissal of its application. Dismissal was requested in order for the principals of Media One, James and Jeanette Pagano, to comply with a condition affecting the grant of applications for the assignment of the licenses of WAVW(FM), Vero Beach, Florida (BALH-890629GW), and WCXL(FM), Vero Beach, Florida (BALH-890629HC and BALH-890629HD). Specifically, that condition requires that the Paganos divest themselves of all interest in and sever any connection with the subject application for Gifford, Florida prior to consummation of the assignment of the license of WCXL(FM) to Media IV, a Florida general partnership of which the Paganos are principals. However, the dismissal Media One requests is contingent on consummation of the assignment of the license of WCXL(FM). Further, Media One requests that dismissal be without prejudice to reinstatement of its application for a construction permit for the Gifford, Florida allocation, in the event that consummation of the assignment of the WCXL(FM) license does not occur. The contingent and qualified nature of Media One's dismissal request does not satisfy the condition to which the grant of the assignment of the WCXL(FM) was subject. Accordingly, Media One's petition for voluntary dismissal will be denied herein.

3. On February 27, 1989, Ameriwave filed an engineering amendment which sought to modify certain parameters for its antenna, including the heights of the tower and radiation center. The subject amendment, which was not accompanied by a petition for leave to amend, was filed well after the expiration of the 30 day period during which minor amendments may be filed as of right. Pursuant to 47 C.F.R. § 73.3522(a), all amendments filed outside the specified periods for filing amendments as of right and prior to designation for hearing must be accompanied by a showing of good cause or be

filed pursuant to 47 C.F.R. § 1.65, which requires the prompt filing of an amendment to reflect significant changes in information given in an application, or be filed pursuant to 47 C.F.R. § 73.3514. Ameriwave's late-filed amendment was not accompanied by the requisite good cause showing, and cannot be considered pursuant to 47 C.F.R. § 1.65 or 47 C.F.R. § 73.3514. Accordingly, Ameriwave's late-filed amendment will be returned.

4. Ameriwave proposes to collocate its antenna on the existing WTTB(AM) tower. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Ameriwave may have failed to comply with the environmental criteria set forth in the Report and Order in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under these rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Ameriwave's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must include the cumulative effects of the proposed FM facilities, the collocated AM facilities and all nearby RF sources. In this regard, if the site is presently fenced in compliance with the guidelines, Ameriwave is required to so state and give the distance from the base of the tower to the fence. Accordingly, Ameriwave will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

5. *Beard.* Beard, by an amendment as of right filed July 5, 1988, reported that its principal, Molly Beard, is employed as General Manager of Station WAVW(FM), Vero Beach, Florida. The amendment includes a pledge that Ms. Beard will terminate her employment with WAVW(FM) upon grant of the subject application. Because Ms. Beard's continued employment at WAVW(FM) following grant of the subject application may affect Beard's ability to comply with the Commission's cross-interest policy, an appropriate divestiture condition will be specified. *See Reexamination of the Commission's Cross-Interest Policy*, 4 FCC Rcd 2208 (1989) (Policy Statement); 4 FCC Rcd 2035 (1989) (Further Notice of Inquiry/Notice of Proposed Rule Making); 2 FCC Rcd 3699 (1987) (Notice of Inquiry).

6. Information before the Commission indicates that Triple H was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

An identical three-fold issue was specified in each of the above proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolve the potentially disqualifying character issue. This unresolved character issue calls into question Triple H's qualification to be a Commission licensee. Triple H amended its application as of right on July 6, 1988 in order to indicate that its ownership structure had changed from a general partnership to a corporation. Triple H specified in the amendment that the corporation's non-voting shareholder is a general partnership, which is insulated by the corporate by-laws from the day-to-day operation of the corporation and any media properties the corporation may acquire. Although the interests of Triple H's non-voting shareholder apparently are not attributable under the standard set forth in the *Report and Order, Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable and Newspaper Entities*, 55 RR 2d 1465 (1984), *recon. granted in part*, 58 RR 2d 604 (1985), the unresolved character issues are imputed to the applicant. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

7. Item 5(e) of Section II, FCC Form 301 (October 1986) requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application in any pending or concluded Commission proceeding which left unresolved character issues against the application." If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. Triple H has responded to Item 5(e) in the negative. However, Commission records indicate that Guy E. Poteat and Willie F. Poteat are limited partners in the Swanton, Ohio proceeding referenced above. However, Triple H has failed to timely

amend its application pursuant to 47 C.F.R. § 1.65 to notify the Commission of the outstanding character issues. Accordingly, an appropriate issue will be specified below.

8. *Rowland*. By letter dated May 20, 1988, Rowland requested that her application for the subject allocation be dismissed. On March 13, 1989, Rowland provided the staff a declaration, made under penalty of perjury, that she has neither been promised nor received any consideration, directly or indirectly, in connection with her May 20, 1988, request for dismissal of the application for new FM service to Gifford, Florida. Because Rowland has complied with 47 U.S.C. § 311(c)(3) and 47 C.F.R. § 73.3525(a), her application will be dismissed herein.

9. *Other Matters*. In response to Section VI, FCC Form 301, the applicants below have indicated that they will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the 5-Point Model EEO Program. The EEO Programs submitted by the listed applicants are incomplete or otherwise deficient in the manner described. Accordingly, the listed applicants will be required to file amended EEO Programs with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANT	DEFICIENCY
Orion	Failed to identify specific sources of recruitment specializing in women and minority candidates.
Press, Beard	Failed to identify specific sources of recruitment specializing in women candidates.
Mayes	Failed to identify specific sources of recruitment specializing in women and minority candidates.
	Failed to identify specific publications to be used for employment advertisement, which have significant circulation among or are of particular interest to, women and minority candidates

10. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Pursuant to 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Orion	August 2, 1988; May 15, 1989.
Media One	September 13, 1988.
Morbak	July 11, 1988; August 5, 1988; September 15, 1988; February 21, 1989; June 30, 1989; October 2, 1989.
Ameriwave	January 25, 1990.
Jiant	March 23, 1989 (Engineering), April 21, 1989.
Press	July 26, 1989

11. Ameriwave proposes to side-mount its antenna on an existing tower licensed to WTTB(AM). However, the tower data submitted in Section V-B of FCC Form 301 (October 1986) in Ameriwave's application is inconsistent with that contained in the Commission's records. In Item 7(a) of Section V-B, Ameriwave lists the overall height above ground level (AGL) of the existing tower at 103 meters and the overall height above mean sea level (AMSL) of the tower as 110 meters. Commission records indicate that the existing tower is cleared for heights of 78 meters AGL and 85.3 meters AMSL. Because Ameriwave proposes to locate on an existing tower licensed to an existing Commission licensee, and because specific reference is made to the existing tower in Ameriwave's application, the staff could accurately verify the pertinent tower heights by taking official notice of the tower parameters found in the Commission's records for the licensed collocated facilities. Accordingly, Ameriwave's application is acceptable for filing. However, Ameriwave must either file an amendment correcting the tower heights listed in Section V-B of its application, or submit documentation to establish that the heights specified are, in fact, correct and the Commission's and FAA's records are in error. In addition, an air hazard issue will be specified below.

12. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Morbak, Jiant, Avello, and Mayes would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

13. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the residence address of each of its principals. Press has not completed Item 4 correctly because no street address is listed for the individual principals of the corporate applicant. Accordingly, Press will be required to submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

14. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

16. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e) the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Ameriwave in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Triple H.

3. To determine whether Triple H's organizational structure is a sham.

4. To determine whether Triple H violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report the designation of character issues against other applicants in which one or more of its partners has an ownership interest and/or the dismissal of such ownership interest and/or the dismissal of such applications with unresolved character issues pending.

5. To determine, from the evidence adduced pursuant to Issues 2 through 4 above, whether Triple H possesses the basic qualifications to be a licensee of the facilities sought herein.

6. To determine whether there is a reasonable possibility that the tower height and location proposed by Morbak, Ameriwave, Jiant, Avello and Mayes would constitute a hazard to air navigation.

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

17. IT IS FURTHER ORDERED, That for the reasons stated in paragraph 2 hereinabove, the request for voluntary dismissal filed October 16, 1989 by Media One IS HEREBY DENIED.

18. IT IS FURTHER ORDERED, That for the reasons stated in paragraph 3 hereinabove, the amendment filed February 27, 1989 by Ameriwave IS HEREBY RETURNED.

19. IT IS FURTHER ORDERED, That in accordance with paragraph 4 hereinabove, Ameriwave shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

20. IT IS FURTHER ORDERED, That in the event of a grant of Beard's application, the contruction permit shall be conditioned as follows:

Prior to the commencement of operation of the station authorized herein pursuant to program test authority, the permittee shall certify to the Commission that its general partner Molly Beard has terminated her employment and severed all connections with Station WAVW(FM), Vero Beach, Florida.

21. IT IS FURTHER ORDERED, That in accordance with paragraph 8 hereinabove, the application filed by Gwendolyn G. Rowland IS HEREBY DISMISSED.

22. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Orion, Press, Beard and Mayes shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

23. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Orion, Media One, Morbak, Ameriwave, Press, and Jiant ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

24. IT IS FURTHER ORDERED, That Ameriwave shall submit an amendment in accordance with paragraph 11 herein above to the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That Press shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

26. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

27. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

28. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

29. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2), as amended, and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-191

In re Applications of

MS. BENNETT KESSLER File No. BPH-880519MF
(hereafter "Kessler")

BILL DEAN CRAMER File No. BPH-880519NG
(hereafter "Cramer")

For Construction Permit for a
New FM Station on Channel 292A in
Independence, California

HEARING DESIGNATION ORDER

Adopted: March 22, 1990; Released: May 14, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. *City Coverage*. Cramer provides *no* 3.16 mV/m signal to the proposed city of license. The FM branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). In that Cramer's application fails to provide any 3.16 mV/m signal to Independence, it obviously is not in substantial compliance with this requirement. Cramer, in his request for waiver of Section 73.315(a) of the Commission's Rules, indicates that he is unable to secure a site in or near Independence due to strict restrictions on land where the city of Independence itself is located. However, competing applicant Bennett has secured a site which provides full city coverage. Accordingly, Cramer has not provided circumstances which warrant a waiver of Section 73.315(a), and an appropriate issue will be specified.

4. *Coordinate Discrepancy*. Cramer proposes to mount his antenna on the tower of existing FM translator stations K249CJ, K252CE and K288DL. According to the Commission's database, the accepted coordinates for this tower are 36^0 58' 33" North Latitude, 118^0 07' 05" West Longitude. Examination of Cramer's site map reveals a slight discrepancy between the plotted coordinates and those correctly listed in Section V-B of the application. Cramer plots the coordinates as follows: 36^0 58' 33" North Latitude; 118^0 07' *02* " West Longitude. Because Cramer clearly proposes to locate on the existing tower of a Commission licensee, and because specific reference is made to this tower in Cramer's application, the staff can, "drawing on this application as a whole" and taking official notice of site coordinates and tower heights in Commission files, confidently verify Cramer's antenna site location. Accordingly, the application was correctly found to be both tenderable and acceptable. However, Cramer must file a corrected site map within 30 days of the release of this Order.

5. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Kessler have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Kessler would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a a subsequent Order upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Kessler would constitute a hazard to air navigation.

2. To determine whether the proposal of Cramer would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that section.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, that Cramer shall file the amendment specified in paragraph 4 with the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall pusuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearings within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-204

In re Applications of

RHODES COLLEGE File No. BRED-890331VB

For Renewal of License for
Radio Station WLYX
Memphis, Tennessee

COSSITT LIBRARY File No. BPED-890628MH
d/b/a MEMPHIS/SHELBY
COUNTY PUBLIC
LIBRARY AND
INFORMATION CENTER
Memphis, Tennessee

Req. Channel 207A, 89.3 MHz
2.75 kW ERP, 59 Meters HAAT

For Construction Permit

HEARING DESIGNATION ORDER

Adopted: March 22, 1990; Released: May 14, 1990

By the Chief, Audio Services Division:

1. The Commission by the Chief, Audio Services Division, acting pursuant to delegated authority, has before it (1) the application of Rhodes College for renewal of license for noncommercial educational FM station WLYX, Memphis, Tennessee; and (2) the mutually exclusive application of Cossitt Library d/b/a Memphis/Shelby County Public Library and Information Center (MSCPLIC) for authority to construct a new noncommercial educational FM station on Channel 207A in Memphis, Tennessee.

2. The applicants in this proceeding have not indicated that any attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether or not a share-time arrangement between the applicants would be the most effective use of the frequency and, thus, better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560, published October 24, 1978. *See also Cleveland Board of Education*, 87 FCC 2d 9, 16 (1981). In the event that this issue is resolved in the affirmative, it will also be necessary to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

3. The applicants are qualified to construct and operate as proposed. However, because the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding. Accordingly, IT IS ORDERED that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent order, upon the following issues:

1. To determine: (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and, if so, the terms and conditions; (b) the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

4. IT IS FURTHER ORDERED That, in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

5. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate a written appearance stating an intention to appeär on the date fixed for the hearing and to present evidence on the issues specified in this Order.

6. IT IS FURTHER ORDERED That, the applicants herein, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, shall give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-196

In re Applications of

George S. Flinn, Jr. (hereafter "Flinn")	File No. BPH-880310NU
Reina Broadcasting, Inc. (hereafter "Reina")	File No. BPH-880310NV
Barrio Broadcasting, Inc. (hereafter "Barrio")	File No. BPH-880310MU (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on Channel 234A
in Corpus Christi, Texas

HEARING DESIGNATION ORDER

Adopted: March 22, 1990; Released: May 14, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* An engineering review of Barrio's application reveals that the proposed operation exceeds the maximum facilities allowed under the Agreement Between the United States of America and the United Mexican States Concerning Frequency Modulation in the 88 to 100 MHz Band ("U.S.-Mexican Agreement"), 24 U.S.T. 1815, T.I.A.S. No. 7697. Barrio proposes 3 kilowatts effective radiated power (ERP) and 100 meters antenna height above average terrain (HAAT). The U.S.-Mexican Agreement limits Class A FM stations operating at 3 kW within 320 kilometers of the U.S.-Mexican border to a maximum HAAT of 91 meters. *See, e.g., Kerrville Radio, A limited Partnership*, 2 FCC Rcd 3441 (1987); *Kerr County Broadcasting*, 4 FCC Rcd 5021 (1989). Accordingly, Barrio's application will be dismissed as inadverently accepted for filing.

3. On July 27, 1989, Reina filed a petition to deny Flinn's application. Reina's petition to deny is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issues pleadings in pending cases, the matters sought to be raised in this petition have not been considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229.

4. An engineer review of the applications herein reveals that if the city boundaries of Corpus Christi as depicted in the applications are correct, it will not be possible for any of the applicants to cover Corpus Christi with the required 70 dBu using the maximum effective radiated power and height above average terrain for Class A stations. This is due to the length of Corpus Christi (approximately 43.5 km from north to south). Accordingly, we will grant the Flinn and Reina requests for waiver of 47 CFR § 73.315(a).

5. *Tower Coordinate Discrepancy.* Reina proposes to mount its antenna on an existing tower structure. However, the coordinates listed in Section V-B of FCC Form 301 (October 1986) are inconsistent with those contained in the Commission's records. In Item 2(b), Section V-B of FCC Form 301, Reina lists the coordinates of the existing tower as 27^0 48' 51" North Latitude and 97^0 31' *34* " West Longitude. However in a technical exhibit to the application Reina notes that the Commission's tower database identifies the existing tower at 27^0 48' 51" North Latitude and 97^0 31' *35* " West Longitude. Reina claims that the coordinates scaled from the map "are deemed to be more accurate than those in the Commission's tower database." Accordingly, Reina must either file an amendment correcting the coordinates listed in its application to those in the Commission's tower database, or in the alternative, have the tower owner correct the coordinates to coincide with those in Reina's proposal. Because of the discrepancies in the coordinates, an FAA issue must be specified.

6. *Tower Height Discrepancy.* The tower data submitted in Section V-G of FCC Form 301 in Flinn's application, is inconsistent with that contained in the Commission's records. Flinn lists the overall height above ground level (AGL) as 90 meters and the overall height above mean sea level (AMSL) as 101 meters. Commission records indicate heights of 74 meters AGL and 85.3 meters AMSL. Accordingly, Flinn must either file an amendment correcting the heights listed in his application, or submit documentation to establish that the heights specified, are, in fact, correct and the Commission's records are in error. In addition, because of the discrepancies in the heights an FAA issue will be specified.

7. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after June 24, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS
Flinn	September 7, 1988; October 6, 1988; February 3, 1989; March 1, 1989; August 28, 1989; February 12, 1990
Reina	July 7, 1989

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Flinn and Reina would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHERED ORDERED, That the Reina petition to deny IS DISMISSED.

11. IT IS FURTHERED ORDERED, That Barrio's application IS DISMISSED as inadverently accepted for filing.

12. IT IS FURTHERED ORDERED, That the Flinn and Reina city coverage waiver requests ARE GRANTED.

13. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Flinn and Reina ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHERED ORDERED, That Reina shall submit an amendment in accordance with paragraph 5 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

16. IT IS FURTHERED ORDERED, That Flinn shall submit an amendment in accordance with paragraph 6 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-169

In re: Applications of

MOBILE BROADCAST SERVICE, INC. File No. BP-870325AE
WLPR, Prichard, Alabama

Has: 960 kHz, 1 kW, 2.5 kW-LS, DA-N, U
Req: 960 kHz, 1 kW, 5 kW-LS, DA-N, U

WILLIE J. MARTIN File No. BP-870722AG
Ensley, Florida

Req: 950 kHz, 1 kW, 5 kW-LS, DA-2, U

For Construction Permit

HEARING DESIGNATION ORDER

Adopted: March 13, 1990; Released: May 14, 1990

By the Chief, Audio Services Division:

1. *Preliminary matters.* The Commission, by the Chief, Audio Services Division, acting pursuant to delegated authority, has under consideration the above-captioned mutually exclusive applications of Mobile Broadcast Service, Inc. ("Mobile"), and Willie J. Martin ("Martin").[1] Also before the Commission is a petition to deny the Martin application filed by H & C Communications, Inc. ("H & C"), licensee of KPRC(AM), Houston, Texas, and pleadings and amendments responsive thereto.

2. *Martin.* The petition filed by H & C requests denial of the Martin application, alleging nighttime interference to KPRC's protected nighttime interference-free contour (NIFC); that the proposed site is located near high voltage power lines and a 199' tower, which would result in significant radiation to KPRC; and that the proposed nighttime directional array lacks stability. Martin filed an amendment on July 21, 1988, which reduced radiation in the direction of KPRC by 6%, thereby eliminating interference to the station's protected NIFC. Furthermore, in his opposition, Martin stated that the subject power line is located 0.7 miles (3700') away from the site and would, therefore, propose no reradiation problems to KPRC. However, before the Commission may grant a license to Martin, he shall be required to prove that his array is operating within the authorized standard pattern by submitting a complete proof-of-performance. Furthermore, with regard to the nighttime-stability issue, our studies indicate that with parameter variations of 0.5 percent field-ratio and 0.5 degree relative-phase, the proposed nighttime directional array constitutes a critical array. Consequently, any construction permit issued to Martin will be conditioned accordingly. In light of the foregoing, the petition filed by H & C will be dismissed as moot.

3. *City Coverage.* The map submitted by Martin to establish nighttime coverage in compliance with 47 C.F.R. § 73.24(j) shows the NIFC to be 9.71 mV/m, while staff calculations show the NIFC as 17.8 mV/m, which would not provide substantial coverage of the city of Ensley. Martin is required to submit a new map showing the boundaries of Ensley clearly and the percentage of city coverage. Accordingly, an appropriate issue will be specified.

4. *Financial Qualifications.* Martin has failed to demonstrate that he is financially qualified to construct and operate the proposed station in Ensley, Florida. When Martin submitted his original application, he stated that an amendment certifying his financial qualifications would be submitted, which amendment, however, was never received by the Commission. Accordingly, an appropriate issue will be specified below.

5. Except as indicated by the issues specified below, both applicants are qualified to construct and operate as proposed. However, since the proposals are for different communities, we will specify an issue to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal would better provide a fair, efficient, and equitable distribution of radio service. We will also specify a contingent comparative issue, should such an evaluation of the proposals prove warranted.

6. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether the proposal of Willie J. Martin would provide coverage of the city sought to be served as required by 47 C.F.R. § 73.24(j), and, if not, whether circumstances exist which warrant waiver of that section.

2. To determine whether Willie J. Martin is financially qualified to construct and operate as proposed.

3. To determine: (a) the areas and populations which would gain or lose primary aural service from the proposal of Mobile Broadcast Service, Inc. and the availability of other primary service to such areas and populations, (b) the areas and populations which would receive primary aural service from the Willie J. Martin proposal and the availability of other primary service to such areas and populations, and (c) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal would better provide a fair, efficient and equitable distribution of radio service.

4. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, better serve the public interest.

5. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

7. IT IS FURTHER ORDERED, That, for the reasons set forth above, the petition to deny filed by H & C Communications, Inc. against the application of Willie J. Martin IS DISMISSED AS MOOT.

8. IT IS FURTHER ORDERED, That Willie J. Martin file the amendment specified in paragraph 3 above with the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C.

10. IT IS FURTHER ORDERED, That to avail themselves the opportunity to he heard and pursuant to 47 C.F.R. § 1.221(c), the applicants shall, within 20 day of the mailing of this Order, in person or by attorney, file with the Commission, in triplicate, written appearances stating an intention to appear on the dates fixed for the hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Initially returned as unacceptable for filing, the Martin application was later accepted *nunc pro tunc* to its original submission date.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Sections 73.1211 and
and 76.213 of the Commission's Rules

ORDER

Adopted: April 30, 1990; Released: May 1, 1990

By the Commission:

1. Section 1304 of title 18 of the United States Code generally prohibits the broadcasting of lotteries and information or advertisements concerning lotteries.[1] There are several exceptions to this prohibition, including one contained in Section 1307(a), which exempts broadcasts concerning state-conducted lotteries when the broadcast station is located in the state conducting the lottery or in an adjacent state that also conducts a lottery.[2]

2. On November 7, 1988, the President signed into law the Charity Games Advertising Clarification Act of 1988 ("Act"), [3] which becomes effective May 7, 1990. This law expands the Section 1307 exception to the Section 1304 prohibition against the broadcasting of lottery information. Specifically, Section 1304 will not apply to:

> (1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law, which is --
>
> . . . .
>
> (B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or
>
> (2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is --
>
> (A) conducted by a not-for-profit organization or a governmental organization; or
>
> (B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.[4]

3. To summarize, beginning on May 7, 1990, broadcasters will be permitted to advertise lotteries authorized or not otherwise prohibited by the state in which they are conducted if they are conducted by: (a) not-for-profit organizations[5]; (b) governmental organizations; or (c) commercial entities, provided the lottery is clearly occasional and ancillary to the primary business of the commercial organization. Broadcasts of advertisements of state-conducted lotteries will be subject to a narrower restriction. Such broadcasts are only permitted in the state conducting the lottery and in other states that have such lotteries. In contrast, broadcasts concerning lotteries conducted by other governmental organizations will be permitted in any state, regardless of whether lotteries are authorized in the state, as long as the lottery is lawful in the state in which it is conducted.

4. Section 73.1211 of the Commission's Rules currently reflects the restrictions of Section 1304 and the pre-amendment exceptions of Section 1307.[6] To bring the Commission's rules into conformance with the newly amended Section 1307(a), we are amending Section 73.1211, as set forth in the attached Appendix. The amended Section 73.1211 will track the language of new Section 1307(a) and will be effective on May 7, 1990.

5. Section 76.213 of our cable television rules currently contains similar requirements regarding the cablecast of lottery information when a cable system is engaged in origination cablecasting.[7] Effective May 7, 1990, we also amend that section, as indicated in the Appendix, to allow the cablecast of lottery information to the same extent as authorized for broadcast under the Act.

6. We emphasize that until May 7, stations are bound by the stricter exceptions currently contained in Sections 73.1211 and 76.213 and described above at paragraph 1. We also stress that when the amendments contained in the Act do become effective, broadcast and cablecast advertising for gambling casinos, such as those in Las Vegas, Nevada, and Atlantic City, New Jersey, will continue to be unlawful.

7. Because these rules merely codify the statute, we find for good cause that compliance with the notice and comment and effective date provisions of the Administrative Procedure Act (APA) is unnecessary.[8] In addition, we are authorized to make this rule effective less than 30 days after publication under the APA because it is a substantive rule which relieves restrictions.[9]

PAPERWORK REDUCTION ACT STATEMENT

8. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure or record retention requirements. These rules will not increase or decrease burden hours imposed on the public.

ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, Parts 73 and 76 of the Commission Rules and Regulations ARE AMENDED as set forth in the attached Appendix.

10. IT IS FURTHER ORDERED that the amendments to the Commission's Rules and Regulations shall become effective on May 7, 1990.

11. Further information on this proceeding may be obtained by contacting Ben Halprin at (202) 632-3860 in the Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Title 47 CFR Parts 73 and 76 are amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. Section 73.1211 is amended by revising paragraphs (c)(1) and (d), removing paragraphs (c)(1)(i) and (c)(1)(ii) and adding new paragraph (c)(4) to read as follows:

73.1211 Broadcast of lottery information.

* * * * *

(c) * * *

(1) A lottery conducted by a State acting under the authority of State law which is broadcast by a radio or television station licensed to a location in that State or any other State which conducts such a lottery. (18 U.S.C. § 1307(a); 102 Stat. 3205).

* * * * *

(4) A lottery, gift enterprise or similar scheme, other than one described in paragraph (c)(1) of this section, that is authorized or not otherwise prohibited by the State in which it is conducted and which is:

(i) Conducted by a not-for-profit organization or a governmental organization (18 U.S.C. § 1307(a); 102 Stat. 3205); or

(ii) Conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization. (18 U.S.C. § 1307(a); 102 Stat. 3205).

(d)(1) For purposes of paragraph (c) of this section, "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. It does not include the placing or accepting of bets or wagers on sporting events or contests.

(2) For purposes of paragraph (c)(4)(i) of this section, the term "not-for-profit organization" means any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986.

3. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, 309.

4. Section 76.213 is amended by revising paragraph (c) and adding new paragraph (e) to read as follows:

76. 213 Lotteries.

* * * * *

(c) The provisions of paragraphs (a) and (b) of this section shall not apply to advertisements or lists of prizes or information concerning:

(1) A lottery conducted by a State acting under authority of State law which is transmitted:

(i) By a cable system located in that State;

(ii) By a cable system located in another State which conducts such a lottery; or

(iii) By a cable system located in another State which is integrated with a cable system described in paragraphs (c)(1)(i) or (c)(1)(ii) of this section, if termination of the receipt of such transmission by the cable systems in such other State would be technically infeasible.

(2) Any gaming conducted by an Indian Tribe pursuant to the Indian Gaming Regulatory Act. (25 U.S.C. §§ 2701 *et seq.*).

(3) A lottery, gift enterprise or similar scheme, other than one described in paragraph (c)(1) of this section, that is authorized or not otherwise prohibited by the State in which it is conducted and which is:

(i) Conducted by a not-for-profit organization or a governmental organization; or

(ii) Conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

* * * * *

(e) For purposes of paragraph (c)(3)(i) of this section, the term "not-for-profit organization" means any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986.

FOOTNOTES

[1] 18 U.S.C. § 1304 (1984).

[2] 18 U.S.C. § 1307(a). *See also* 18 U.S.C. § 1305 (exempting broadcasts concerning certain types of fishing contests); Indian Gaming Regulatory Act, Pub. L. No. 100-497, § 21, 102 Stat.

2467, 2486 (1988), codified at 25 U.S.C.A. § 2720 (West Supp. 1990) (exempting the broadcast of certain Indian gaming information).

[3] Pub. L. No. 100-625, 100 Stat. 3205 (1988), codified at 18 U.S.C.A. § 1307 (West Supp. 1989).

[4] Pub. L. No. 100-625, § 2, 100 Stat. at 3205.

[5] The Act defines a "not-for-profit organization" as "any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986." Pub. L. No. 100-625, § 2(b), 100 Stat. at 3205.

[6] Under the Commission's existing exceptions to the lottery broadcast restrictions, stations are permitted to air broadcasts concerning (1) state-conducted lotteries in states conducting the lotteries or in adjacent states that also conduct a lottery, (2) certain fishing contests and (3) certain Indian gaming information. *See* 47 C.F.R. § 73.1211(c), as amended in *Report and Order*, FCC No. 89-124, 4 FCC Rcd 4590 (1989).

[7] 47 C.F.R. § 76.213.

[8] 5 U.S.C. §§ 553(b)(B), 553(d)(3).

[9] 5 U.S.C. § 553(d)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-215

In the Matter of

Amendment of Part 32, Uniform System of Accounts for Telecommunications Companies, to Revise the Accounting for General Purpose Computer and Information Management Expenses

ORDER

Adopted: May 9, 1990; Released: May 9, 1990

By the Deputy Bureau Chief, Common Carrier Bureau:

1. On April 10, 1990, the Commission released a *Notice of Proposed Rule Making* in which it proposed to eliminate Account 6124, General Purpose Computers Expense, and Account 6724, Information Management.[1] Interested parties were given until May 10, 1990, to file comments. On May 3, 1990, several parties[2] jointly filed a motion requesting that the time for filing initial comments in this proceeding be extended to June 22, 1990.

2. The parties state that they need additional time to make the appropriate, detailed analysis of the successive effects of the Commission's proposed rule changes on: (a) the shifts from the accounts proposed for elimination to the remaining accounts; (b) the shifts between regulated and nonregulated operations; (c) the shifts between interstate and intrastate jurisdictions; and, (d) the shifts between access and non-access elements. The parties contend that without adequate time to analyze the effects of the Commission's proposed elimination of Accounts 6124 and 6724, they will be denied the opportunity for full and informed participation in this Rule Making.

3. We believe that the parties interested in this proceeding have had sufficient time to study the effects of the Commission's proposed rule change. We are not persuaded by the circumstances presented and do not believe that an extension of 43 days to file comments is warranted. Therefore, we are denying the motion requesting an extension of time for filing initial comments in this proceeding.

4. IT IS THEREFORE ORDERED, that the Motion for Extension of Time IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Bureau Chief,
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 32, Uniform System of Accounts for Telecommunications Companies, to Revise the Accounting for General Purpose Computer and Information Management Expenses, 55 Fed. Reg. 14438 (April 18, 1990).

[2] The following parties jointly filed the motion: The ALLTEL Companies, Century Telephone Enterprises System, Illinois Consolidated Telephone Company, Pacific Telesis, Southwestern Bell Telephone Company, Sugarland Telephone Company, Perco Telephone Company, Waterwood Telephone Company, Tri-County Telephone Company and the Telephone Utilities Exchange Carrier Association.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-209

In re Applications of

IRENE BUSTOS and COMUN, INC. d/b/a Los Lunas Project (hereafter "LLP") — File No. BPH-880519NQ

PATRICIA BENNS KOMOROWSKI (hereafter "Benns") — File No. BPH-880519OA

For Construction Permit
for a New FM Station on Channel 292A
in Los Lunas, New Mexico

HEARING DESIGNATION ORDER

Adopted: March 30, 1990; Released: May 15, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after September 8, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS
LLP	June 13, 1989
Benns	November 7, 1988; November 17, 1988; December 27, 1988; February 15, 1989; June 6, 1989; December 1, 1989

3. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by LLP would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

4. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by LLP would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by LLP and Benns ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-83

In re Applications of

WEBSTER - FULLER COMMUNICATIONS ASSOCIATES — File No. BPH-870312MJ

For a Construction Permit for a
New FM Station on Channel 274A
in Webster, New York

APPEARANCES

James F. Rogers and *Carol Ann Siciliano* on behalf of Webster-Fuller Communications Associates;[1] and *Robert Zauner* on behalf of Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: May 7, 1990; Released: May 15, 1990

FINDINGS OF FACT INTRODUCTION

1. What started out as a ten-applicant proceeding for Channel 274A(102.7 MHz) in Webster, New York has turned into a single applicant proceeding. *See* FCC 89R-189 released June 19, 1989. Webster-Fuller Communications Association (WFCA) is the sole remaining applicant.

2. WFCA faces two basic qualifying issues (FCC 88M-2140, released July 8, 1988.)

> "To determine whether WFCA is financially qualified to be a Commission licensee; and
>
> "To determine whether WFCA misrepresented when it affirmatively certified its financial qualifications in BPH-870312MJ, and if so, whether WFCA is basically qualified to be a Commission licensee."

3. We held the hearing on those two issues on October 12, 1989 (Tr. Vol. 3), and closed the record the same day. Both WFCA and the Mass Media Bureau [3] filed Proposed Findings of Fact and Conclusions of Law on December 4, 1989. There both parties resolved the two basic qualifying issues in WFCA's favor. Reply Findings, if any, were due on or before December 14, 1989. Neither party elected to file Replies.

PROCEDURAL BACKGROUND [4]

4. It started out a ten-applicant proceeding.[5] But it quickly dropped to three applicants. Compare 53 F.R. 8975 published March 18, 1988 and with FCC 88M-1039 released April 8, 1988.

5. Those three applicants (WFCA, Anthony E. Trimble (Trimble), and Peter Achilles Broikou (Broikou)) then became engaged in a heated, almost vicious, pleading battle. They began by lodging Petitions to Enlarge against each other. When the smoke cleared, eleven issues had been added to the proceeding, seven of them character issues. Each of the three faced at least one character issue, and it reached a stage where the Presiding Officer had to point out to them that a settlement without a hearing had become an impossibility.

6. Having obtained eleven additional issues, the parties then engaged in a lengthy discovery battle under those issues. The litigation reached a temporary plateau on August 25, 1988, when WFCA and Broikou moved to have Trimble's application dismissed. They succeeded. *See* FCC 88M-3328, released October 6, 1988.[6]

7. However, 21 days after WFCA and Broikou had moved to dismiss Trimble, the three of them apparently had a change of heart. On September 15, 1988, the three of them filed a Joint Request for Approval of Agreement. That request was later denied as moot. *See* FCC 88M-3352 released October 7, 1988.

8. After WFCA's request for appeal was denied (FCC 88M-3428, released October 17, 1988) and their First Motion for Summary Decision was denied (FCC 88M-3476, released October 18, 1988), WFCA next moved to have the Presiding Officer disqualified, and removed from the case. *See* FCC 88-3712 released Novemer 2, 1988, and FCC 88-3795, released November 8, 1988.[7] Once they had the trial halted they then petitioned for extraordinary relief and filed a second settlement package with the Commission.

9. On June 19, 1989, the Commission issued a comprehensive order on the several matters before it (FCC 89R-189). Among other things, they reinstated Trimble's application, approved the second settlement package, dismissed Trimble's and Broikou's applications, and remanded the case for the trial of WFCA's two basic qualifying issues. *See* para. 2 *supra*.

10. Aware that the case was now a singleton, the Commission pointed out that " . . . the Mass Media Bureau as a general practice participates in single applicant proceedings where qualifying issues have been designated. Thus, the Bureau can make an independent evaluation of the questions raised concerning Webster-Fuller's qualifications and express its views to the ALJ on the proper course to be followed in this proceeding." *See* FCC 89-189 *supra*, at para. 12.

11. With the structural change in the case; i.e., from a three applicant case without the Bureau to a one-applicant case with the Bureau, a remarkable change took place. All traces of litigiousness disappeared. From the outset and even though one of the two issues WFCA faced was a character issue, the Bureau displayed a curious neutrality in favor of WFCA.

12. They initiated no discovery on WFCA's financial and false certification issues, although they had full opportunity to do so. *See* FCC 89M-1742 released June 28, 1989. In fact they made no use of the discovery WFCA's opponents had taken when the three applicants were still in an adversarial posture. When (within two weeks of the remand hearing date) on September 28, 1989, WFCA filed a third[8] post-designation amendment request; a request that significantly altered WFCA's ownership and financial structure, the Bureau had no opposition or comments.

See FCC 89M-2485 released October 18, 1989. The Bureau proceeded as if *Erwin O' Conner's* [9] six-point test for good cause no longer existed.[10]

13. The following day, September 29, 1989, WFCA filed still another Petition for Leave to Amend.[11] There they sought to change transmitter sites. This time, and without any attempt to discuss *Erwin O' Conner's* tests, the Bureau supported a grant of the motion. *See* Tr. 80; and FCC 89M-2494, released October 19, 1989.

14. Meanwhile, back on September 22, 1989, WFCA filed a Second Motion for Summary Decision.[12] There they *again* tried to get the two basic qualifying issues resolved in their favor without a hearing. Even though the reasons for denying the *first* summary decision motion still applied, the Bureau supported the second request. *See* FCC 89M-2482, released October 18, 1989.[13]

15. Based on the foregoing (paras. 10-14 *supra.*), and despite protestations to the contrary (Tr. 87), the conclusion is justified that the remanded hearing was conducted at something less than arms length. Plainly stated, Bureau counsel may have interpreted the Commission's remand order and the instructions contained in that order (paras. 9-10 *supra.*) as calling for a grant of WFCA's application, and acted accordingly from that day forward.

16. These facts are noted because, if by some quirk of fate, an appellate body is called upon to review this case they won't be misled into thinking that WFCA's basic qualifying issues were thoroughly and virorously tested. That simply wasn't the case.

WFCA'S FINANCIAL QUALIFICATIONS ISSUE

17. WFCA estimates that it has $445,436 to meet their total anticipated costs. They must pay dismissing applicants $260,000. However, $25,000 of that amount has already been paid. So they have $235,000 of settlement costs they must pay. They estimate their total construction and three months operating costs to be $210,436.[14]

18. They intend to meet these costs through a $500,000 loan from the Jefferson National Bank. The loan commitment letter is dated September 23, 1988, and the loan is subject to a 2% loan origination fee. So the net amount available to WFCA would be $490,000. The loan commitment letter meets the Commission's requirements.

19. Based on Findings 17-18 *supra.*, the Intermediate Finding is warranted that WFCA has met the financial qualification issue, and that issue is resolved in its favor.

WFCA'S FALSE FINANCIAL CERTIFICATION ISSUE

20. WFCA, a limited partnership, filed its Webster application on March 12, 1987. At that time it had one general partner, Donna Fuller, and two limited partners, David W. Mance and George W. Kimble (Tr. 111, 214, 285-286). It was Ms. Fuller who signed the application and certified to WFCA's financial qualifications (Tr. 175).

21. It was Ms. Fuller and Mr. Mance who first discussed applying for the Webster station in the spring of 1986 (Tr. 111-113, 115). Mance's brother is married to Fuller's sister (Tr. 111). Mance, a professional broadcaster, at the time owned interests in several New York radio stations (Tr. 138, 238). He told Ms. Fuller that the FCC would be accepting applications for the Webster license (Tr. 111-112). Ms. Fuller said she was interested in applying for that licnse, but also told Mance that she didn't have the capital to apply and eventually construct the station herself (Tr. 112, 114).

22. Mance indicated that he would be interested in investing in the application with her, and they generally discussed the costs that would be associated with a new radio station (Tr. 113, 119).

23. Late in 1986 or early 1987, Mance mentioned the Webster possibility to George Kimble. He asked Kimble if he (Kimble) was interested in investing the project as a limited partner to help assume its financial obligations (Tr. 221-222, 230, 285-286). Kimble, with 20 years of broadcast experience, had been partners with Mance in at least one other radio investment (Tr. 222). He told Mance he was interested, and Mance, in turn, relayed that information to Ms. Fuller (Tr. 120-121, 222, 286).

24. Mance told Ms. Fuller that he and Kimble had been partners in a radio station in Dansville, New York from 1978 to 1982, that Kimble owned radio stations in Ithaca and Syracuse, and that he had recently sold an AM/FM station in Canandaigua, New York (Tr. 129, 122, 230-231). Mance assured Ms. Fuller that Kimble had more than adequate finances to meet his obligations as a limited partner of WFCA.[15] Ms. Fuller agreed that Mr. Kimble could participate because that would make for more available income to construct and operate the station (Tr. 120-121, 128).

25. Late in 1986 or early 1987, Mance and Kimble discussed the approximate costs of constructing and operating the proposed station (Tr. 219-220, 288). This was before WFCA filed its application. Both Mr. Mance and Mr. Kimble had previously started several radio stations "from scratch" (Tr. 287, 290). Each agreed to prepare his own itemized estimates of cost based on his experience. Tr. 287-288. They then compared their estimates over the telephone. They concluded that it would cost between $95,000 and $115,000 to construct and operate the station, and about $45,000 to operate it for three months without revenue (Tr. 287, WFCA Ex. 5(d)).

26. About the same time (in January or February 1987) Mance and Ms. Fuller discussed cost estimates. He explained to her that the Commission required an applicant to certify that it had sufficient resources to construct and operate for three months without revenue. They went into specific costs WFCA could expect to incur. This included the cost of acquiring a tower site, building an antenna and tower, obtaining transmitter and studio equipment, and meeting payroll and other operating expenses (Tr. 117, 118, 218, 221, and 228-229). Mance explained to Fuller that it would cost between $140,000 and $160,00 to construct and operate for three months without revenue (Tr. 117, 217-218).

27. During their discussion Ms. Fuller was aware that Mr. Mance owned three other stations. He assured her that he was financially able to meet his share of those expenses because he had just sold a station in Dansville, New York, for which he had received a promissory note (Tr. 138). She didn't see Mance's financial statement. Nor did she discuss his liabilities before WFCA filed their application. But she believed that his profits from the Dansville sale would enable Mance to meet his WFCA commitment (Tr. 138-139, 210).

28. Ms. Fuller relied on Mance's broadcast experience as both as owner and manager of radio stations. She accepted his estimates as being reasonable. But she also

consulted WFCA's then communications attorney, James Oyster. Based on his representation of other applicants for new stations Oyster told her that the figures were "in line."

29. Ms. Fuller then had several meetings with Kimble to discuss the application (Tr. 122, 131), and Kimble's role as a limited partner and investor. Kimble confirmed the reasonableness of Mance's cost estimates (Tr. 122, 131, 301). He affirmed that he was committed to supply his share of WFCA's prosecution, construction, and operating expenses.

30. They discussed Kimble's professional and financial background. Kimble told Fuller that he had just signed a contract to sell his Ithaca station, and that he would reap a substantial profit from the sale. He also told her that he currently owned valuable stations in Canandaigua and in a Syracuse suburb (Tr. 132, 301-302). However, Kimble never showed her his current financial statement. Nor did he discuss his liabilities with her (Tr. 132; WFCA Ex. 4 at 2). But he did orally assure her that both he and Mance could meet their WFCA financial commitments from the proceeds of their respective Dansville and Ithaca sale (Tr. 301). James Oyster, then WFCA's Attorney further orally corroborated Kimble's assurance (WFCA Ex. 4; Tr. 301).

31. Mr. Kimble drafted a letter dated February 26, 1987 that both he and Mance signed. There they agreed to provide WFCA a $160,000 line of credit to construct and operate the station for three months without revenue. They further agreed to share this obligation 50/50 (Tr. 234, 312). The letter also stated that Kimble and Mance would provide up to an additional $100,000 to WFCA if the station needed it after the first three months.

32. Before WFCA filed its application Mance and Kimble discussed their financial ability to meet this commitment (Tr. 311). Both concluded that they were financially able to meet their commitment, and Kimble felt he could fund the entire amount if asked to do so (Tr. 326-327).

33. However, on March 12, 1987, when Donna Fuller certified that WFCA was financially qualified "she had never seen the personal balance sheets or other personal financial statements of George Kimble or David Mance, nor had she seen any other written evidence demonstrating their ability to provide the funds described in their letter to her dated February 26, 1987." It wasn't until sometime in 1988 that Donna Fuller requested and was given financial statements from both Mr. Kimble and Mr. Mance (Tr. 203, 208).

PRELIMINARY CONCLUSIONS OF LAW

1. Webster-Fuller Communications Association (WFCA), the sole remaining applicant for Channel 274A (102.7 MHz) in Webster, New York faces two basic qualifying issues: a financial qualifications issue and a false financial certification issue.

WFCA'S FINANCIAL QUALIFICATIONS ISSUE

2. WFCA is financially qualified. They anticipate their costs at $445,436. This includes $235,000 of settlement costs that remain to be paid along with total construction and three months operating costs of $210,436.

3. They will meet those costs through a $500,000 loan from the Jefferson National Bank. The loan commitment letter, dated September 23, 1988, meets the Commission's requirements, and is subject to a 2% loan origination fee. So the net amount WFCA would have available to it is $490,000. This still leaves a financial cushion of over $50,000. So the financial qualification issue poses no barrier to a grant of WFCA's application.

WFCA'S FALSE FINANCIAL CERTIFICATION ISSUE

4. The record is clear and undisputed that at the time she certified to WFCA's financial qualifications, Donna Fuller (WFCA's General Partner) didn't have the necessary documents to support that certification.

5. Instead, Ms. Fuller relied on the *oral* cost estimates and *oral* assurances of her two limited partners, David Mance and George Kimble, that they had the ability to meet those costs.[16] She was subsequently shown documents which indicate that Mance and Kimble had the requisite financial resources at the time of certification, and that they were willing to finance the project.

6. It is further concluded that Ms. Fuller had seriously tried to ascertain WFCA's predictable costs. After all, David Mance's (who provided the oral cost estimates she relied on) brother was married to her sister.

7. Thus, we have a factual situation that requires the application of one of two precedents. We could apply *Las Americas Communications, Inc.*, 1 FCC Rcd 786 (1986). There the Review Board concluded that "[t]he *sine qua non* for financial qualifications under prior case precedent and the new certification procedure is *written documentations* . . . "

8. In that case the Board concluded that " . . . the view espoused by [the applicant] at hearing and in its pleadings that written loan agreements, written bank loan commitments, and written balance sheets or financial statements from individuals are not needed . . . has never been the law and is not now the law under the certification procedure . . . "[17]

9. "Similarly," said the Board, "where individuals are providing funds, they must also support their undertakings with balance sheets or financial statements . . . "

10. If we applied *Las Americas* WFCA would certainly be denied. At the time Donna Fuller certified WFCA's financial qualifications "she had never seen the personal balance sheets or other personal financial statements of George Kimble or David Mance." Nor had she seen any other written evidence demonstrating their ability to provide the funds described in their February 26, 1987 letter to her. So without the *sine qua non* and " . . . the proper standard of proof -- documentary evidence -- . . . " WFCA's application would have to be denied.

11. However, neither the Mass Media Bureau nor WFCA would apply *Las Americas*. They believe that this case is governed by the Commission's later holding in *Northampton Media Associates*, 4 FCC Rcd 5517 (1989). There the Commission bought that "aggregation of bunkum" that the applicant espoused in *Las Americas* as being the correct view. They held that an applicant needn't have the documents in hand to support its certification at the time it certifies "provided that the applicant had reasonable assurance of adequate funds at the time of certification."

12. The Commission then stated that to prove "reasonable assurance," "the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs," and that it also "must provide substantial and reliable evidence showing 'sufficient net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue as the 1981 version of Form 301 requires."[18] Where the source of funds is a person, said the Commission, the applicant must show that the person had the necessary financial resources to fund the project at the time of certification.[19]

13. There is no question that WFCA meets the Commission's *Northhampton* test. The uncontradicted record evidence shows that Donna Fuller, before certifying, engaged in serious and reasonable efforts to ascertain WFCA's predictable costs. WFCA has also shown by substantial and reliable evidence that it had the funds from committed sources to construct and operate for three months without revenue. And finally Mance and Kimble have shown that they had the requisite financial resources to fund the project at the time of the certification.

14. Given the two precedents to choose from, *Las Americas* and *Northhampton*, the Presiding Officer must apply *Northhampton*. It is the later holding, and it is a Commission holding. In fact, and although nobody seems willing to say so, it appears that *Northhampton* has soundly reversed the Review Board's *Las Americas* holding. But, in any event, when the *Northhampton* test is applied the conclusion is warranted that WFCA did not misrepresent when it affirmatively certified in its application that it was financially qualified to be a Commission licensee.

ULTIMATE CONCLUSIONS

15. Multiple owner, George W. Kimble, has acquired yet another radio station in upstate New York. Kimble owns 75% of WFCA's equity. WFCA has shown itself basically qualified to be a Commission licensee, and entitled to the grant.

SO unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion,[20] Webster-Fuller Communications Association's application (BPH-870312MJ) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] Originally WFCA was represented by James L. Oyster. Present counsel took over via an amended Notice of Appearance filed June 29, 1989.

[2] At para. 2 of their Findings the Bureau erroneously refers to this date as "July 8, 1989."

[3] Once the proceeding becomes a singleton, the Mass Media Bureau steps in and completes the case. *See* "Procedural History" *infra*. for a description of the Bureau's role.

[4] This procedural background has been set out so the reader can appreciate how, even in a small case, applicants can manipulate and put upon the Commission's processes.

[5] In the Introduction of its Proposed Findings of Fact, the Mass Media Bureau erroneously states that originally only three applications were designated for hearing.

[6] The Review Board reaffirmed Trimble's dismissal. *See* FCC 89R-3 released February 10, 1989.

[7] There were times when these parties didn't know where or how to plead. They seemed to be striking out in all directions. But one concept eventually emerged loud and clear. They were willing to go to any lengths to avoid trying the eleven issues they had so diligently sought. *See* paras. 4-6 *supra*.

[8] Previous post-designation amendments were accepted on April 18, 1988 (FCC 88M-1040) and on October 27, 1988 (FCC 88M-3604).

[9] *See Erwin O' Conner Broadcasting Co.*, 22 FCC 2d 140 (Rev. Bd. 1970).

[10] At the time the application was filed, Donna Fuller was a 25% equity holder and WFCA's General Partner. George W. Kimble and David Mance were each limited partners, and each held 37.5% equity. WFCA Exhibit 2. However, within two weeks of the remanded hearing George Kimble bought out David Mance, and became WFCA's sole 75% limited partner.

[11] Notice that WFCA filed two substantial amendments on two successive days. This was apparently so they could at least argue that they were minor amendments. This may have been the Bureau's suggestion. *See* Tr. 69-70.

[12] WFCA's first summary decision request was denied on October 19, 1988 (FCC 88M-3476).

[13] WFCA's counsel consulted Bureau counsel before they filed their second summary decision motion (Tr. 64-65, 77, 84-85).

[14] Equipment and installation costs of $167,143, and three months operating expenses of $43,293.

[15] Mance had seen Kimble's financial statements in 1982, and again in 1986 (Tr. 242-243). Kimble, in turn, testified that Mance was "fairly familiar" with his [Kimble's] finances (Tr. 311-312).

[16] Since this is no longer a "comparative" proceeding, there is no need to determine whether WFCA is a "sham" applicant. But the record reflects clearly that it is 75% limited partner, George Kimble, who calls all the shots. In other words, when the Commission turned the proceeding into a non-comparative one, WFCA no longer had to hide behind the facade of a 24% equity female general partner. Once granted will George Kimble retain Donna Fuller as WFCA's General Manager? Or will he pay her a pittance and send her on her way? Who knows? More regretably, who cares?

[17] The Board went so far as to describe the applicant's view as " . . . one of the most egregious cases of arrogant contempt for the Commission's processes that the Board has ever encountered" and presented " . . . such an aggregation of bunkum that 'setting the record straight' herein should provide a useful restatement of the certification procedure as it was meant to operate."

[18] Without any competitor to test WFCA's showing it was wasn't very difficult to prove "it engaged in serious and reasonable efforts . . . " Nor was it difficult to provide "substantial and reliable evidence" after the fact.

[19] Also see *Susan S. Mulkey*, 4 FCC Rcd 5520(1989).

[20] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, the Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-534

In re Application of

CHARLES B. SHAFER File No. 22584-CD-AL-79

For authority to assign Station KGC397
from Charles B. Shafer, Assignor, to
Hazel-Tone Communications, Inc., Assignee

In re Application of

CHARLES B. SHAFER File No. 20095-CD-P-80

For authority to change antenna system and
replace transmitter of Public Land Mobile
Service Station KGC397 operating at
Mountaintop, Pennsylvania

Appearances

Howard M. Wilchins and *Thomas J. Beers* on behalf of the Common Carrier Bureau, and *David L. Hill* and *Audrey P. Rasmussen* on behalf of Hazel-Tone Communications, Inc., John P. Gabriele and Charles B. Shafer.

INITIAL DECISION OF ADMINISTRATION LAW JUDGE JOSEPH P. GONZALEZ

Issued: May 7, 1990; Released: May 15, 1990

1. Under consideration is the Joint Motion for Approval of Settlement and for Summary Decision, Stipulation of Facts and Joint Exhibits filed by John Gabriele, Hazle-Tone Communications, Inc., Charles B. Shafer (hereinafter collectively identified as Hazel-Tone), and by the Chief, Common Carrier Bureau on February 12, 1990.

2. Hazel-Tone and the Common Carrier Bureau request that the Presiding Judge approve the parties' joint settlement agreement, grant their motion for summary decision in Hazel-Tone's favor of the issues set forth below[1] and also grant the pending applications. The Presiding Judge finds good cause for granting the relief sought, and it will be so ordered.

3. The *Hearing Designating Order* released in this proceeding on November 28, 1988 (CC Docket No. 88-534) designated the following issues for hearing:

(1) To determine all the facts and circumstances surrounding the placing of the advertisement in the yellow pages directory.

(2) To determine all the facts and circumstances surrounding the use of Gabriele's transmitter by Shafer.

(3) To determine, on the basis of the evidence adduced above, whether Gabriele misrepresented material facts to the Commission or lacked candor.

(4) To determine, on the basis of the evidence adduced above, whether Gabriele is qualified to be a Commission licensee.

(5) To determine, on the basis of all the above, whether a grant of the applications would be in the public interest, convenience and necessity.

STATEMENT OF FACTS

4. Hazel-Tone entered into an agreement with Charles B. Shafer (Shafer), trading as Radio Paging of Northeastern Pennsylvania on February 23, 1979, to purchase his common carrier paging facilities located at Mountaintop, Pennsylvania. A copy of the agreement was filed on September 20, 1979 with the Federal Communications Commission as part of an application for consent to the assignment (Joint Exhibit 13). The application was granted on February 6, 1981, and Hazel-Tone, by its owner John Gabriele, notified the Commission by letter dated March 24, 1981 that the transaction had been closed and that the FCC license had been assigned to Hazel-Tone.

5. On August 12, 1979, Mr. Gabriele signed a document captioned "Agreement for Directory Advertising" in the "Yellow Pages" of the Bell Telephone Company of Pennsylvania (Joint Exhibit 1). The document contained no title or company designation when signed by Mr. Gabriele; however, the name "John P. Gabriele" and the abbreviation "Part" appears in print on the document next to Gabriele's signature. According to the parties, these additions were made to the document sometime after August 12, 1979.

6. The advertisement referenced above was prepared by John Rokita of the Reuben H. Donnelly Corporation for the so-called "Yellow Pages" of the Bell Company of Pennsylvania. Mr. Rokita testified before the Pennsylvania Public Utilities Commission that he made the alterations to the advertisement agreement after Mr. Gabriele signed the document (Joint Exhibit 10, pp. 625, 628-29). Both Mr. Gabriele and Mr. Shafer had no contact with Mr. Rokita or his employer, the Reuben Donnelly Company, after the August 12, 1979 meeting, and both indicated that they were unaware of the status of this matter until the Bell Company's "Yellow Pages" was released sometime in late 1979. Mr. Shafer informed Bell of Pennsylvania in late 1979 or early 1980 that he had not authorized the advertisement (Joint Exhibit 20), neither Mr. Shafer nor Mr. Gabriele paid for the advertisement, and The Bell Company of Pennsylvania deleted the charge from Mr. Shafer's periodic billing statement. The Bell Company of Pennsylvania represented to this Commission that the charge was deleted because it had been included in its "Yellow Pages" without proper authorization (Joint Exhibit 15).

7. Mr. Gabriele, at the time he entered into the purchase agreement with Mr. Shafer in February 1979, felt that it was necessary to upgrade Shafer's paging system by replacing his transmitter and antenna systems, and by converting his operation from an AM to a FM modulation. Mr. Gabriele ordered the necessary materials in 1979 in anticipation of what he believed would be a routine approval of the assignment of Mr. Shafer's paging system

to Hazel-Tone so that it would be on hand when the assignment was approved. Mr. Shafer filed an application with this Commission for the minor modification in the paging system in October 1979.

8. Mr. Shafer's existing paging facilities were destroyed by a lightning strike in the early part of 1980 (Joint Exhibit 14(c)). Replacements for the damaged AM transmitter and antenna could not be found, so Mr. Shafer decided to lease Gabriele's FM transmitter and antenna which he had already acquired in order to convert Shafer's AM paging operation to a FM modulation. Mr. Shafer obtained a special temporary authority (STA) from the FCC allowing installation and operation of the FM equipment and a letter confirming the oral grant of the STA was sent by the Commission on January 21, 1980 (Joint Exhibit 14(c) and (d)). The parties agreed to the basic terms of the lease arrangement late in January 1980, and they prepared and executed a written agreement based on these orally agreed to terms and conditions on July 1, 1980 (Joint Exhibit 6 and 7). Invoices were sent for monies due and owing under the lease arrangement and some payments were made pursuant to the terms of the lease (Joint Exhibit 16, 17, and 18). The existence of the lease was disclosed by Mr. Shafer in response to an inquiry concerning this matter from the Mobile Services Division of the Common Carrier Bureau of this Commission (Joint Exhibit 13(b)).

9. Mr. Gabriele states in his declaration that he does not believe that he violated any law, Commission rule, or Commission policy, and he represents that he acted in good faith at all times in his dealings with the Commission (Joint Exhibit 19).

CONCLUSIONS OF LAW

10. The joint stipulation of facts as supported by the joint exhibits properly demonstrates that the Messrs. Gabriele and Shafer have, at all times, acted in good faith in dealing with this Commission with respect to the pending applications. There is absolutely no indication, on the basis of the information supplied here, that Mr. Gabriele either intentionally misrepresented to this Commission any material facts with respect to these applications or that he lacked candor with this Commission regarding the circumstances surrounding the "Yellow Pages" advertisement or the equipment lease arrangement.

11. The Presiding Judge concludes, therefore, that the facts stipulated to by Hazel-Tone and the Common Carrier Bureau as supported by the joint exhibits, leaves no material questions of fact with respect to the issues designated in this proceeding left to be resolved through the hearing process; and that the Messrs. Gabriele and Shafer have at all times acted in good faith and in the belief that their conduct was not in violation of the law, the Commission's Rules or policy.

12. Accordingly, Mr. Gabriele is found to be qualified to be a Commission licensee, and the proposed assignment as well as the application for modification of Shafer's existing facilities are found to be in the public interest. All subsequent applications filed by Mr. Gabriele with this Commission will be processed in due course without any reference to the allegations raised in this proceeding while, at the same time, giving full effect to the findings made and the conclusions reached here.

13. The Presiding Judge finds good cause for approving the joint settlement agreement since it will permit the prompt resolution of this matter in a manner which comports with the record and the equities in this proceeding and it will obviate the need for the further expenditure of resources by the Commission and Hazel-Tone.

14. Accordingly, IT IS ORDERED that the Joint Motion for Approval of Settlement and For Summary Decision, Stipulation of Facts and Joint Exhibits filed by John Gabriele, Hazel-Tone Communications, Inc., Charles B. Shafer, and by the Chief, Common Carrier Bureau on February 12, 1990 IS GRANTED; the settlement agreement IS APPROVED and the issues designated in this proceeding ARE RESOLVED in John P. Gabriele's favor; that the application for authority to assign station KGC397 from Charles B. Shafer, Assignor, to Hazel-Tone Communications, Inc., Assignee (File No. 22584-CD-AL-79) and the application to change antenna system and replace transmitter of public land mobile service station KGC397, operating in Mountaintop, Pennsylvania (File No. 20095-CD-P-80) ARE GRANTED; that Mr. Gabriele WILL PAY to the United States Treasury within 40 days of the release date of this *Order* the sum of $1,500 U.S. dollars; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

FOOTNOTE

[1] Mobilphone of Northeastern Pennsylvania, Inc. filed a petition for leave to intervene which was granted on the record at the prehearing conference held on January 24, 1989. Mobilphone subsequently notified the Presiding Judge of its withdrawal as a party.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BELLSOUTH

Petition for Waiver of Section 32.4240 of the Commission's Rules to Permit Amortization of Debt Refinancing Expenses, Unamortized Discounts and Premiums Associated with Reacquired Debt Either Over the Life of the Replacement Issue or Over the Remaining Life of the Called Debt Issue

AAD 8-1901

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 1990; Released: May 15, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On February 6, 1989, the New York State Department of Public Service (NYDPS) filed a petition for reconsideration of a *BellSouth Waiver Order* that denied two waiver requests, one filed by BellSouth Corporation and South Central Bell Telephone Company, and the other by BellSouth Corporation and Southern Bell Telephone and Telegraph Company.[1] The denied waiver requests pertain to Part 32 accounting rules that apply to debt refinancing transactions (retirement of existing debt and issuance of replacement debt). Part 32 requires carriers to include the entire amount of reacquisition gains or losses (usually losses) in the determination of net income in the year in which the old debt is retired.[2] NYDPS believes it would be sound regulatory policy to amortize any losses (spread them over current and future periods) rather than recognize them in the year in which the old debt is retired.

II. BACKGROUND

2. Effective January 1, 1988, the Commission replaced an existing Uniform System of Accounts for Telephone Companies (Part 31) with an entirely new uniform system of accounts (Part 32). [3] In adopting the new Part 32, the Commission decided that the accounting system should be consistent with generally accepted accounting principles (GAAP) to the extent regulatory considerations permit. Since GAAP expressly prohibits the amortization of gains or losses on debt reacquisitions, even in refinancing transactions, Part 32 contained no provision for the amortization of such gains or losses.[4]

3. On March 26, 1987, BellSouth petitioned the Commission for an amendment of Part 32 to include a provision in Part 32 that would allow carriers to request permission to amortize debt reacquisition gains or losses in refinancing situations. After considering the merits of the request, the Commission concluded that such a provision was unnecessary. In an Order released on October 30, 1987, the Commission denied the BellSouth Rule Making petition.[5] In the *Debt Refinancing Order*, the Commission noted that such refinancing was inconsistent with GAAP, and that carriers could still request waivers when they expect a departure from the rules would be appropriate. The Commission denied BellSouth's Petition for Reconsideration of the *Debt Refinancing Order* on April 18, 1990.

4. On January 28, 1988, BellSouth filed the waiver requests that were denied in the *BellSouth Waiver Order*. NYDPS seeks reconsideration of the *BellSouth Waiver Order* for the reasons discussed in succeeding paragraphs.

III. SUMMARY OF THE PETITION

5. NYDPS alleges that Part 32 treatment, which requires recognition of a loss in the year the debt is extinguished, provides no specific recovery of debt reacquisition losses. As a result, a carrier that chooses to redeem its high cost debt will not recover the costs of the redemption. NYDPS asserts that this policy provides inadequate incentive for carriers to consider refinancing during times of lower interest rates. NYDPS states that in the *BellSouth Waiver Order* the Commission discounts this lack of incentive by pointing to other incentives that currently exist under regulation -- namely, the ability of a utility to achieve a benefit by reducing its embedded cost of debt relative to the industry-wide average used by the Commission to set the allowed rate of return (ROR), and the effects of regulatory lag. NYDPS believes that, in practice, these incentives are not adequate to encourage refinancing when interest rates decline. NYDPS maintains that a utility cannot depend on the fact that the industry-wide average debt cost methodology used by the Commission will not be altered during the refinancing period. Thus the expected benefits may not materialize. NYDPS claims that unless a carrier is guaranteed that the industry-wide average cost method will be used for a sufficient period of time, it is uncertain that a company would refinance. NYDPS goes further to state that if carriers are disinclined to refinance, the industry-wide average cost of debt could be higher than it would be if carriers were allowed to amortize, and this would result in a burden to ratepayers.[6]

6. NYDPS also does not believe that regulatory lag provides as great an incentive as the Commission claims. NYDPS states that its past experience indicates that the costs associated with debt refinancings (*i.e.*, call premiums and reacquisition expenses) generally exceed the short-term difference between the interest cost of the old debt and that of the replacement debt. Therefore, any potential benefit related to regulatory lag may not be sufficient to encourage a carrier to incur debt refinancing costs.[7]

7. NYDPS also claims the example in Paragraph 25 of the *BellSouth Waiver Order* produces a false conclusion. This example added unamortized discounts from the old debt to the discount on the new issue to show the effect of the amortization process on future interest cost calculations. NYDPS states that the one essential criterion for authorizing amortization of reacquisition costs is that the present value of future interest savings on new debt must exceed the costs associated with the old debt. Under these conditions, NYDPS states that the cost of new debt would be lower than the current cost, and not higher as the

example shows. NYDPS states that when debt refinancing is used to achieve a lower interest rate at a net savings, amortization should be permitted, and, in fact, encouraged to ensure that savings are achieved for ratepayers' benefit.[8]

8. Finally, NYDPS contends that the Commission is not considering all aspects of debt redemption. NYDPS explains that when debt becomes callable, it is callable at par, plus a premium based on the initial coupon rate. NYDPS claims that because carriers are willing to pay call premiums, the industry-wide average debt costs reflect lower coupon rates than unregulated industries. NYDPS asserts that this willingness by carriers to pay a call premium in exchange for lower stated interest rates makes elimination of a carrier's opportunity to recover refinancing costs unfair to the carrier and consequently to ratepayers. NYDPS argues that a failure to permit amortization drives a wedge between the cost of debt and the cost of refinancing when in fact the refunding premium should be viewed as an integral component of the total cost of debt.[9]

IV. DISCUSSION

9. Decisions of whether or not to refinance existing debt with lower cost debt are primarily based on an economic analysis of the present value of future interest savings in relation to the costs associated with extinguishment of the existing debt. When the present value of the savings exceeds the costs incurred, refinancing becomes a prudent course of action. The issue of whether or not to amortize the costs associated with the extinguishment of the existing debt affects the way these costs are reflected in reported net income, and not the fundamentals of the economic analysis that is performed or its results. At the heart of the NYDPS petition is the belief that in a regulatory environment the accounting recognition of these costs is a consideration that can alter a carrier's ultimate decision even if the results of an analysis indicate refinancing would be a prudent course of action.

10. NYDPS believes that Part 32 treatment, which requires accounting recognition of reacquisition costs in the year the existing debt is extinguished, will discourage carriers from refinancing because it does not provide for specific recovery of these costs. We do not agree that lack of specific recovery is an issue because, as a matter of actual practice, the Commission uses industry-wide averages in prescribing a "unitary" rate of return applicable to all local exchange carriers. As a result, an individual carrier will not recover its own specific costs regardless of whether the debt reacquisition costs are booked in one year or amortized over a period of years.

11. In the *BellSouth Waiver Order*, we noted that, aside from amortization, there are incentives that do encourage carriers to refinance when interest rates are low. These include the advantages of lowering debt costs in an environment where a "unitary" rate of return is applied to all carriers and the regulatory lag that can occur between refinancing and the next rate of return represcription. While NYDPS believes these incentives are insufficient to encourage carriers to refinance, we hold to the view that in the current regulatory scheme it is always in a particular carrier's best interests to maintain a debt cost level that is as low as possible. The "unitary" rate of return is comprised of both debt and equity costs. The "unitary" return, comprised of both debt and equity components for all Regional Bell Operating Companies, does not precisely reflect the actual distribution of debt and equity costs of an individual carrier. As a result, to the extent an individual carrier's debt costs are below the debt cost component established in the determination of the "unitary" rate of return for all carriers, more "bottom-line" profits flow to shareholders. More "bottom-line" profits can also flow to shareholders when an individual carrier's debt costs are reduced between rate of return represcriptions that might lag behind the refinancing transactions.[10]

12. We also reject NYDPS's contention that the Commission's view of debt costs is too narrow because it does not consider factors that may be implicit in a debt contract. NYDPS believes one important factor can be a trade-off between lower interest rates and higher call premiums that are payable to debtholders if the debt is paid off before it matures. In the scenario NYDPS presents, the existence of high call premium features serve to keep interest rates lower than they would otherwise be.[11] Since the call premium features serve to keep the interest rates lower during the time the old debt is in existence, NYDPS argues it is proper to amortize them and thereby include them in future cost of debt calculations for any replacement debt. We do not believe this association of the call premium on the old debt with the future calculations of the cost of the new debt is a logical one because the old debt contract and the new debt contract operate independently. When debt is recalled from debtholders before maturity, the call premiums are payable whether or not any new debt is issued as a replacement.[12]

13. This subject of a connection between the old debt and new debt was addressed in the development of the prevailing accounting guidance for dealing with debt refinancing transactions that the Commission incorporated into Part 32. The prevailing accounting guidance for dealing with debt refinancing transactions has been established in APB Opinion No. 26.[13] That Opinion expressly prohibits the amortization of gains or losses over future periods. Before imposing this requirement, the Accounting Principles Board (APB) considered several methods to account for debt reacquisition transactions. In adopting its Opinion, the APB concluded that all extinguishments of debt before scheduled maturities are fundamentally alike and that the accounting for such transactions should be the same regardless of the means used to achieve the extinguishment. The view adopted by the APB holds that debt is reacquired and refinanced because the market value of the old debt has changed over time to an extent that paying the call premiums on current value is a favorable way to extinguish the debt. These changes in market value occurring over time have not been reflected in the accounts, and as a result, the recorded amount of debt does not reflect the amount it would take to extinguish the debt. According to the APB, because the changes have taken place in past periods when the old debt contract was in effect, the entire difference between the carrying value of the debt and the reacquisition price should be recorded when the specific debt contract is terminated. Moreover, the Opinion concludes, any call premium and unamortized discount or premium is related to the old debt contract and should not be related to the new issue. We believe this view is fundamentally sound, and when debt reacquisitions are viewed in this light, we again conclude that the prescribed GAAP accounting produces equitable results.

14. For the foregoing reasons, we conclude that the accounting prescribed under Part 32 is appropriate and fair to stockholders and ratepayers, and that no waiver of those rules should be granted here. We therefore deny the NYDPS Petition for Reconsideration.

V. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 USC §405, that the Petition for Reconsideration filed by the New York Department of Public Service IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Petition for Waiver of Section 32.4240 of the Commission's Rules to Permit Amortization of Debt Refinancing Expenses, Unamortized Discounts and Premiums Associated with Reacquired Debt Either Over the Life of the Replacement Issue or Over the Remaining Life of the Called Debt Issue, *Memorandum Opinion and Order*, 4 FCC Rcd 387 (Com. Car. Bur. 1989) (*BellSouth Waiver Order*).

[2] These losses occur when the cost of reacquiring the existing debt (paying it off) exceeds its net carrying value on the books of account. The reacquisition cost is the amount paid for the early extinguishment before maturity, including any call premium (additional payments to debtholders when debt is recalled by the issuer) and expense of reacquisition. The net carrying value includes the amount payable at maturity adjusted for unamortized premiums or discounts related to the debt, as well as any unamortized issuance expenses.

[3] Part 31 was effective through December 31, 1987. It was replaced by Part 32, effective January 1, 1988. Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies, 51 F. R. 24745, July 8, 1986; 51 F. R. 43493, December 2, 1986 (*New USOA Order*), *recon. denied in part and granted in part* 2 FCC Rcd 1086 (1987) (*Reconsideration Order*).

[4] These GAAP requirements are contained in Accounting Principles Board Opinion No. 26, *Early Extinguishment of Debt*, which was issued by the Accounting Principles Board in October 1972 (APB Opinion No. 26). The Accounting Principles Board preceded the Financial Accounting Standards Board as the authoritative accounting standard setting body for the American business community. Even though the Accounting Principles Board (APB) was replaced by the Financial Accounting Standards Board in 1973, APB Opinion No. 26 is still the prevailing guidance for accounting for debt extinguishments.

[5] Use of Certain Generally Accepted Accounting Principles in Part 32 of the Commission's Rules, 2 FCC Rcd 6675 (1987) (*The Debt Refinancing Order*), *recon. denied*, FCC 90-162, released April 26, 1990.

[6] NYDPS Petition at 2-3.

[7] *Id.* at 3-4.

[8] *Id.* at 4-5.

[9] *Id.* at 5.

[10] As NYDPS notes, individual debt costs can be considered as one part of the prescription process but only during a represcription.

[11] NYDPS asserts that it is because of the call premium features that industry-wide average debt costs in the telecommunications industry reflect lower interest rates than unregulated industries. NYDPS offers no evidence in support of this claim. Nor does NYDPS note that unregulated companies are free to incorporate call premiums into their debt contracts, if they choose to do so.

[12] In connection with the example that was used in paragraph 25 of the *BellSouth Waiver Order* to illustrate the effects of bringing the costs of old debt into future period calculations of the cost of new debt, the NYDPS petition reflects an apparent misunderstanding. In the example, the stated interest rates for both old and new debt were held constant but at the time of refinancing the unamortized discount associated with the old debt was added to the calculation of the cost of the new debt. Our purpose was not to evaluate whether or not the old debt should be refinanced, but to show that over time the effects of adding costs associated with old debt (the unamortized discounts) to the costs of the new debt result in higher cost of debt calculations than if the costs of the old debt were not included in future period calculations.

[13] *See* note 4, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-536

In re Applications of

WILLIAMSBURG COUNTY BROADCASTING CORP. — File No. BPH-871008MC

Augusta Radio Fellowship Institute d/b/a SOUTH CAROLINA RADIO FELLOWSHIP — File No. BPED-871008MS

For a Construction Permit for a New FM Broadcast Station on Channel 231A at Kingstree, South Carolina

In the Matter of

WILLIAMSBURG COUNTY BROADCASTING CORP.
Licensee of Station WKSP(AM)
Kingstree, South Carolina

Order to Show Cause Why the License for Station WKSP(AM), Kingstree, South Carolina, Should Not be Revoked

ORDER TO SHOW CAUSE AND ORDER REQUIRING CONSOLIDATION

Adopted: May 1, 1990; **Released: May 8, 1990**

By the Commission:

1. The Commission has before it for consideration its *Order* in MM Docket No. 88-536, 4 FCC Rcd 7592 (released October 10, 1989) and comments submitted in response thereto. In our *Order*, we invited the parties to this proceeding to comment on the advisability of: (a) issuing an order to show cause why the license of Williamsburg County Broadcasting Corp. ("WCB") for Station WKSP(AM), Kingstree, South Carolina, should not be revoked; and (b) consolidating such an inquiry with this comparative proceeding. The Commission's Mass Media Bureau, Augusta Radio Fellowship Institute, Inc. d/b/a South Carolina Radio Fellowship ("SCRF"), and WCB, respectively, filed comments on October 24, 25, and 26, 1989. WCB filed reply comments on November 6. For the reasons that follow, we have decided to issue an order to show cause and to consolidate the inquiry thereunder with the pending comparative proceeding involving WCB's application for a permit for an FM station in Kingstree.

BACKGROUND

2. Gregory Knop has at all relevant times held positive control of WCB. The record shows that agents of the Federal Drug Enforcement Agency arrested Gregory Knop on drug trafficking charges on August 7, 1987 and that he was consequently indicted on six counts under federal law, each count carrying a maximum sentence of 20 years imprisonment and a $1,000,000 fine.

3. On October 8, 1987, after Gregory Knop's arrest, WCB filed its captioned application for a construction permit for a new FM broadcast station at Kingstree. An instruction on the application form required WCB to disclose whether there was then pending in a court or administrative body a proceeding against any party to the application involving "any felony." The instruction further required the disclosure, in regard to any such pending proceeding, of "the facts upon which the proceeding is or was based or the nature of the offense alleged or committed, and . . . the current status or disposition of the matter." WCB responded "yes" to the instruction and provided an accompanying exhibit which disclosed only that there was then pending in Federal Court a felony charge against Gregory Knop pertaining to "nonbroadcast related" matters that were allegedly beyond the Commission's "area of concern."

4. On November 2, 1987, Gregory Knop pleaded guilty in United States District Court for the District of South Carolina, Florence Division, to one count of violating 21 U.S.C. §§ 841(a)(1) and 846 (possession of cocaine with intent to distribute and conspiring to commit that offense). The court sentenced him on January 25, 1988, to five years imprisonment. On March 21, 1988, Gregory Knop reported for incarceration at the Federal Prison Camp, Maxwell Air Force Base, Montgomery, Alabama.

5. WCB did not reveal details of Gregory Knop's criminal activities, including his conviction and sentence, until January 4, 1989, nearly a year later, when it filed an amendment to its FM application in response to a specific request in the *Hearing Designation Order*, 3 FCC Rcd 6926 (released December 5, 1988), for information about the felony charges that it had mentioned in the application.

6. On April 15, 1988, after Gregory Knop had reported to prison, a 49% nonvoting interest in WCB held by two of his relatives was converted to a voting interest, and Gregory Knop's 100% voting interest was reduced to a 51% voting interest. One of the relatives became WCB's Vice President, and the other relative became Secretary-Treasurer. WCB first revealed these ownership changes in the January 4, 1989, amendment.

7. Based on the foregoing, the Presiding Judge added issues in the above-captioned comparative proceeding as to whether WCB had concealed or misrepresented facts in its application concerning the felony charges pending against Gregory Knop, whether WCB had violated Section 1.65 of the rules by failing to promptly report the felony conviction of Gregory Knop and changes in the composition of the applicant, and whether, in light of the conviction and the evidence adduced under the foregoing issues, WCB is qualified to be a licensee. *Order*, FCC 89M-387 (released February 7, 1989).

8. Hearing sessions on these and other issues were held on June 27, 1989, through June 29, 1989, and on July 3, 1989. Gregory Knop, who was incarcerated until August 1989, appeared and testified pursuant to a subpoena on July 3, 1989. The record in the FM proceeding was closed on July 21, 1989, and the parties submitted proposed findings and conclusions on September 27, 1989. Replies were filed on October 11, 1989.

The Parties' Comments

9. In its comments, WCB contends that it would contravene the policy outlined in the discussion in the *Character Policy Statement* concerning the relevance of criminal convictions for "non-FCC" offenses not involving fraud, 102 FCC 2d at 1196-97 and n.42, for the Commission to begin a revocation proceeding because of Knop's drug offense unless it first finds a substantial nexus between that crime and WCB's proclivity to be truthful or comply with FCC rules and policies. Moreover, WCB maintains that the Commission indicated in the *Policy Statement* that drug trafficking is not, in fact, relevant to character qualifications by approvingly citing *Wilkett v. Interstate Commerce Commission*, 710 F.2d 861 (D.C. Cir. 1983). There, the ICC held that the conviction of an applicant's sole proprietor for conspiring to distribute a controlled substance and of second degree murder was no bar to finding the applicant fit for certification as a motor carrier. 102 FCC 2d at 1195 n.35. WCB also contends that the instructions to the current edition of FCC Form 301 give no indication that drug-related convictions are of any significance, thereby confirming their irrelevance.

10. WCB argues that the Commission may not proceed against it here in reliance on the Public Notice of September 29, 1989, *Commission Clarifies Policies Regarding Licensee Participation in Drug Trafficking*, 4 FCC Rcd 7533. The Commission there declared that it would take "all appropriate steps, including initiation of license revocation proceedings," in response to information that FCC licensees have been convicted of drug trafficking. WCB contends that it would be fundamentally unfair for us to invoke the *Clarification* as a basis for a revocation proceeding because Knop's conviction predates that statement.

11. Finally, WCB maintains that the Commission must determine whether its performance as a licensee overrides Knop's misconduct before deciding to issue a show cause order. WCB asserts that the Commission has never cited it for a rule violation in connection with the operation of WKSP; that no one opposed its 1988 application for renewal of that station's license, notwithstanding the (alleged) local notoriety of the conviction in question; and that the Commission granted the renewal application without deferment or inquiry.

12. The Mass Media Bureau urges the Commission to institute a proceeding to determine whether WCB's license for WKSP(AM) should be revoked in light of the conviction of Gregory Knop and also in light of the inquiry pursuant to the related misrepresentation, lack of candor, and Section 1.65 issues that were specified against WCB in the captioned FM proceeding. The Bureau further recommends that the revocation proceeding be consolidated with the hearing on the FM applications. SCRF agrees with the recommendation for the issuance of a show cause order but urges the Commission to refrain from consolidating the revocation inquiry with the comparative proceeding, contending that consolidation would unnecessarily delay resolution of the latter.

DISCUSSION

13. We find no merit in WCB's arguments. The *Policy Statement* affords guidance as to the kinds of "non-FCC" offenses[1] not involving dishonesty that might be deemed material to character qualifications. The Commission stated in a footnote that it might consider information that a person has engaged in nonbroadcast misconduct as *prima facie* evidence that he lacks the requisite traits of reliability and/or truthfulness even prior to adjudication by another body if the misconduct is "so egregious as to shock the conscience and evoke almost universal disapprobation." *Id.* at 1205 n.60. It reserved judgment as to what type of misconduct would meet that standard, noting that such determinations would be made "with regard to a specific application involving specific misconduct."

14. Such an issue is raised in this case. Felonious drug trafficking, which involves systematic devotion to a criminal enterprise, has produced according to the President of the United States, "the gravest domestic threat facing our nation today."[2] Indeed, recent legislation permits judicial denial of federal benefits to persons convicted of drug offenses. [3] We think it is within the category of "egregious" non-FCC offenses entailing such callous disregard for the welfare of fellow citizens as to place at issue the perpetrator's qualifications to be or remain a broadcaster.[4] A doubt certainly exists as to whether someone recently found guilty of such an egregious crime against society would faithfully serve the public in exercise of the vast and important discretion that this agency entrusts to licensed broadcasters.

15. WCB is mistaken in asserting that by citing *Wilkett* the Commission took the position in the *Policy Statement* that convictions for drug trafficking are immaterial. The Commission cited *Wilkett* merely to show that a sister agency had adopted a doctrine that not all criminal convictions were disqualifying. It did not say or suggest there that, because the ICC had found an applicant qualified to operate as a motor carrier despite his convictions for conspiracy to distribute a controlled substance and second degree murder, it necessarily followed that conviction for drug trafficking would be irrelevant to qualification for a broadcast license. WCB is also mistaken in asserting that FCC Form 301 indicates that "drug-related" convictions are of no concern to the Commission.[5]

16. Nor is there any merit in WCB's argument that to issue a show cause order against it because of Knop's conviction would subject it to retroactive application of a policy that was not clearly delineated until after the misconduct occurred. Even assuming, *arguendo i.e.*, that applicants were not given notice prior to the issuance of the *Clarification* of September 29, 1989 that the Commission would regard drug-trafficking convictions as material to character qualifications, WCB is in no position to claim any equity. Regardless of any pronouncement of the FCC, Knop was on notice by virtue of Federal criminal statutes in effect when he engaged in misconduct that it was punishable by fine and imprisonment. As WCB cannot seriously maintain that any alleged ambiguity of the *Policy Statement* gave Knop just cause to believe that he had any right to engage in drug trafficking, WCB cannot properly claim that we are estopped from reconsidering

its character qualifications in light of his conviction and taking appropriate action should we come to an adverse conclusion.

17. We also disagree with WCB's contention that we must weigh its performance as a licensee before deciding whether to issue a show cause order. The alleged circumstances that WCB pleads in this regard, if true, are not so clearly decisional as to obviate further inquiry as to its qualifications in light of Knop's conviction and the relevant circumstances noted here. WCB is free to present such matters to the ALJ, and we will consider in due course any argument of this kind as the case comes before us.

18. In sum, we hold that Gregory Knop's felony drug trafficking conviction raises a serious question as to WCB's fitness to remain the licensee of WKSP(AM) and that it would not serve the public interest to postpone resolution of that question until the end of its current license term. The issues that the presiding ALJ has specified against WCB in the above-captioned comparative proceeding concerning misrepresentation, lack of candor, and violation of reporting requirements are also relevant to WCB's qualifications as the licensee of WKSP(AM). Therefore, we shall institute a proceeding to determine, upon the findings to be reached regarding those issues, whether the Commission should revoke WCB's license for that station. Because evidence has already been adduced in the above-captioned proceeding concerning the matters in issue, we will consolidate the revocation proceeding with the ongoing comparative proceeding.[6]

19. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 312(a)(4) of the Communications Act of 1934, as amended, Williamsburg County Broadcasting Corp. IS DIRECTED TO SHOW CAUSE why the license for Station WKSP(AM), Kingstree, South Carolina, should not be REVOKED, based upon findings to be made upon the following issues:

(a) whether Williamsburg County Broadcasting Corp. misrepresented facts or was lacking in candor in its application for a new FM station at Kingstree, South Carolina (File No. BPH-871008MC), in failing to provide full disclosure of the felony charges pending against Gregory Knop.

(b) whether Williamsburg County Broadcasting Corp. violated Section 1.65 of the rules by failing to report the felony conviction of Gregory Knop and changes in the composition of the applicant.

(c) whether, in light of the felony drug trafficking conviction of Gregory Knop and the evidence adduced under (a) and (b) above, Williamsburg County Broadcasting Corp. is qualified to remain the licensee of Station WKSP(AM).

20. IT IS FURTHER ORDERED, That this revocation proceeding shall be CONSOLIDATED with the above-captioned proceeding in MM Docket No. 88-536.

21. IT IS FURTHER ORDERED, That pursuant to Section 312(d) of the Communications Act of 1934, as amended, the Mass Media Bureau shall bear the burden of proceeding with the introduction of evidence and the burden of proof with respect to the ultimate issue regarding Williamsburg County Broadcasting Corp.'s qualifications to remain the licensee of WKSP(AM).

22. IT IS FURTHER ORDERED, That the evidentiary record developed in the proceeding in MM Docket No. 88-536 for a construction permit for a new FM broadcast station at Kingstree, South Carolina, may be considered as part of the evidentiary record in the consolidated proceeding to determine why the license of WKSP(AM), Kingstree, South Carolina, should not be revoked.

23. IT IS FURTHER ORDERED, That Williamsburg County Broadcasting Corp. shall have the opportunity at hearing to present relevant evidence by way of mitigation.

24. IT IS FURTHER ORDERED, That the Proposed Findings of Fact and Conclusions of Law filed in MM Docket No. 88-536 on September 27, 1989, by the Mass Media Bureau shall constitute its BILL OF PARTICULARS in this consolidated revocation proceeding.

25. IT IS FURTHER ORDERED, That the Notice of Appearance filed in MM Docket No. 88-536 on December 27, 1988, by Williamsburg County Broadcasting Corp. shall constitute its NOTICE OF APPEARANCE in this consolidated revocation proceeding.

26. IT IS FURTHER ORDERED, That any exceptions to the Presiding Judge's Initial Decision in this consolidated proceeding shall be directed to the Commission.

27. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, shall send copies of this *Order* by Certified Mail - Return Receipt Requested, to:

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Counsel for South Carolina Radio
Fellowship

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The *Policy Statement* describes misconduct as "non-FCC" if it was not in violation of the Communications Act or "a specific . . . rule or policy" of the FCC.

[2] As quoted in *Clarification*, supra, 4 FCC Rcd at 7533.

[3] Anti-Drug Abuse Act of 1988, 21 U.S.C. § 853a. We recognize that this legislation did not take effect until after the drug conviction in question here, and our reference here should not be construed as a suggestion that the Anti-Drug Abuse Act applies to this conduct, but only as a reflection of the abhorrence with which such conduct is viewed.

[4] Under the circumstances, we need not decide whether there is a nexus between Knop's felony conviction and the licensee's proclivity to be truthful or to comply with the FCC's rules and policies so as to otherwise come within the ambit of the *Policy Statement*. In this regard, although we are currently engaged in a general review of the *Policy Statement*, we wish to emphasize that those deliberations have not played any role in the determinations reached in this proceeding.

[5] The Form 301 requires that "[a]ny felony" case be reported to the Commission. The instructions in Form 301 regarding the relevance of non-FCC misconduct are also consistent with the *Policy Statement*. Instruction E to Section II of the form advises applicants that these categories of non-FCC misconduct are relevant: (1) misrepresentations to government agencies resulting in criminal or civil violations; (2) criminal convictions involving false statements or dishonesty; (3) *certain felony convictions;* and (4) adjudicated violations of anticompetitive or antitrust laws that are broadcast related. The instruction further advises applicants that the pertinent policies are more fully expounded in the *Policy Statement*.

[6] We disagree with SCRF's contention that it would be administratively more efficient to hold proceedings under the show cause order in abeyance pending final resolution of the character issues in the captioned comparative proceeding than to consolidate these matters. While consolidation may, to some degree, retard resolution of the comparative case, we think that in view of the substantial identity of the character issues to be considered in these proceedings it would be more conducive to overall efficiency to proceed in tandem.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Aeronautical Radio Inc.,
Northwest Airlines, Inc.,
and United Air Lines, Inc.,
Petition for Waiver of
Sections 87.147 and 87.187
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: May 8, 1990; Released: May 9, 1990

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. Aeronautical Radio, Inc. (Arinc), Northwest Airlines, Inc., and United Air Lines, Inc. (Petitioners) have jointly requested waivers of Sections 87.147 and 87.187 of the Commission's Rules, 47 C.F.R. §§ 87.147 and 87.187, regarding type acceptance of equipment and frequencies for aircraft stations, respectively. Waiving these rules would permit operation of non-type accepted[1] aircraft earth stations via the International Maritime Satellite Organization (Inmarsat) space segment using maritime frequencies.[2]

II. BACKGROUND

2. This Petition is the product of recent Commission proceedings regarding use of the "L-band" [3] for a generic Mobile Satellite Service (MSS). In General Docket No. 84-1234, the Commission issued (1) a *Memorandum Opinion and Order* [4] that reaffirmed its allocation scheme for the MSS; (2) a *Memorandum Opinion and Order* [5] that upheld the *Second Report and Order* by which it established licensing policies/procedures and technical/regulatory policies for the MSS; and (3) a *Memorandum Opinion, Order and Authorization* [6] by which the Commission authorized the American Mobile Satellite Corporation (AMSC) to construct, launch, and operate the first generation domestic MSS and to operate as both the MSS and AMSS(R)[7] licensee in the upper portion of the L-band. In companion orders, the Commission upheld its 1987 order dismissing Arinc's application to construct a global aeronautical mobile satellite system[8] and allowed the Communications Satellite Corporation (Comsat) to provide international aeronautical satellite services offered by Inmarsat.[9]

3. In light of the multiplicity of matters relating to satellite communications pending before the Commission and the nature of the instant request, *i.e.*, to waive the requirement that type accepted aircraft earth station equipment be used, we put the Petition for Waiver on public notice.[10] No comments were received in response to this notice.

III. DISCUSSION

4. Petitioners seek to implement one component of the satellite communications system provided for in the L-band proceedings. Specifically, Petitioners intend to use the proposed aeronautical satellite communications capability to automate reporting requirements such as position reports for advanced air traffic systems, *e.g.*, automatic dependent surveillance (ADS), and to facilitate engine performance monitoring thereby reducing crew workload and enhancing the safety and efficiency of flight.[11] For the purposes of our discussion here, we consider these types of communication to fall within the definition of the Aeronautical Mobile Satellite (R) Service.[12]

5. We have examined the information before us and conclude that a waiver of the rules to permit early implementation of an aeronautical mobile satellite service is warranted. Petitioners' aeronautical satellite service proposal is highly innovative and technically advanced. The Commission's policy has been to encourage advancements in communication system design and to foster communications that promote the safety of life and property.[13] The proposed system furthers both these objectives. Furthermore, we are mindful that other countries are moving ahead with plans for aeronautical satellite services.[14] Granting the waivers in question would enhance development and implementation of a U.S. aeronautical mobile satellite system and further the Commission's policy of facilitating timely and effective U.S. entry into the international mobile satellite communications market.[15]

6. There are two parts to Petitioners' request. The first part pertains to the requirement to use type accepted equipment. Petitioners' request for waiver is unusual in that the technical standards underlying the type acceptance procedure for aircraft earth stations[16] have not yet been established. Until the technical requirements are promulgated in a Rule Making proceeding, there are no type acceptance standards to waive in order to permit operation of Petitioners' proposed equipment. Accordingly, it is more appropriate in these circumstances to waive Section 87.145 of the Rules, 47 C.F.R. § 87.145, which codifies the requirement to use type accepted equipment, rather than to waive Section 87.147, 47 C.F.R. § 87.147, which codifies the type acceptance procedure.

7. Commission policy, in general, is not to waive the type acceptance requirement where there is any potential for increased interference. In this case, however, we believe sufficient safeguards are in place to minimize interference. Inmarsat, the proposed service provider, would allow an aircraft earth station access to its system only if the station equipment is compatible with the Inmarsat system. To be deemed compatible, the equipment must meet certain technical standards established by Inmarsat.[17] It is in Inmarsat's own best interest to take whatever steps are necessary to minimize interference because any interference would most likely be to other Inmarsat users. Additionally, the likelihood of interference caused by Petitioners' aircraft earth stations is small because the waiver would apply only to a limited number of aircraft. Arinc projects that only 27 airline aircraft in the United States will be equipped for satellite communications by the end of 1990 and 45 by the end of 1991.[18]

8. In addition to their request for waiver of the type acceptance requirement, Petitioners seek a waiver of the frequency allocation rules in Section 87.187, 47 C.F.R. § 87.187, to permit operation on maritime frequencies. Currently, there are no operating satellites capable of provid-

ing aeronautical service on the mobile satellite frequencies, 1645.5-1660.5 MHz. Until Inmarsat launches its second generation satellites, the only available space segment operates on frequencies in an adjacent band allocated to the maritime mobile satellite service, 1626.5-1645.5 MHz.

9. The Commission previously acknowledged this service gap and noted that a waiver permitting use of maritime frequencies may be necessary to carry out the policy goals upon which the L-band proceedings were predicated.[19] Furthermore, allowing frequencies in Maritime Services to be used by eligibles in the Aviation Services is not uncommon. For example, aircraft stations can use maritime mobile and maritime mobile satellite frequencies for public correspondence, *see* 47 C.F.R § 87.185(c).[20]

10. Granting waiver of sections 87.145 and 87.187 to permit timely introduction of aeronautical mobile satellite communications is consistent with Commission policy and precedent. The provision of MSS and AMSS(R) service, however, is dependent upon other related proceedings.[21] In particular, both AMSC and Comsat have each requested waiver of the Table of Allocations, 47 C.F.R. § 2.106, to permit the maritime mobile satellite frequencies in the L-band to be used on an interim basis via Inmarsat for mobile satellite service including AMSS(R).[22] Granting the instant waiver would not prejudice the Commission's decisions in subsequent spectrum allocation, facilities authorization or other matters.

IV. CONCLUSION

11. In view of the foregoing, we find good cause to waive the application of Sections 87.145 and 87.187 of the Commission's Rules in these particular circumstances. Grant of a petition for waiver is appropriate where, as here, it forwards the public interest in a new service without undermining the rationale for the rule.[23]

12. Accordingly, pursuant to the authority contained in Sections 0.131(a) and 0.331(a)(3) of the Rules, 47 C.F.R. §§ 0.131(a) and 0.331(a)(3), the joint petition filed by Arinc, Northwest Airlines, Inc., and United Air Lines, Inc. for waivers of the pertinent sections of the Commission's Rules to permit operation of non-type accepted aircraft transmitters to provide aeronautical satellite communications in a frequency band that includes maritime frequencies IS GRANTED subject to the following conditions:

(a) Waiver of Section 87.145 of the Rules requiring the use of type accepted equipment is of limited duration. Equipment to which the waivers apply shall meet all technical standards promulgated in any future Commission proceeding establishing technical standards for aircraft earth stations in the same manner and according to the time schedule established therein.

(b) Waiver of Section 87.145 of the Rules requiring the use of type accepted equipment is limited to no more than twenty-six total aircraft installations for Petitioner Northwest Airlines and no more than eighteen total aircraft installations for Petitioner United Air Lines. Petitioners shall identify with particularity each such equipped aircraft by submitting notice thereof to the Private Radio Bureau Licensing Facility in Gettysburg, Pennsylvania, in addition to the information required by existing licensing procedures in the Rules.

(c) Waiver of Section 87.187 permits the capability of operation by Petitioners of aircraft radio equipment tunable across the entire frequency band 1626.5-1660.5 MHz, subject to licensing of specific space segment frequencies by appropriate authorities.

(d) Operation in the 1626.5-1660.5 MHz band must accommodate the priority of maritime distress communications currently allowed in this band.[24]

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] *Cf.* 47 C.F.R. § 87.145 (Acceptability of transmitters for licensing); 47 C.F.R. § 87.147 (Type acceptance of equipment). *See infra* ¶ 6 (discussion of applicable section).

[2] *Cf.* 47 C.F.R. § 173 (Subpart E--Frequencies), 47 C.F.R. § 87.187 (Subpart F--Aircraft Stations).

[3] In Gen. Docket No. 84-1234, the Commission limited the term 'L-band' to frequencies in the 1.5/1.6 GHz region of the spectrum. 4 FCC Rcd 6016 n.4.

[4] Memorandum Opinion and Order, In the Matter of Amendment of Parts 2, 22, and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Mobile Satellite Service for the Provision of Various Common Carrier Services, Gen. Docket No. 84-1234, 4 FCC Rcd 6016 (1989) (FCC 89-181), *appeal docketed sub nom.*, Aeronautical Radio, Inc. v. FCC, No. 88-1009 (D.C. Cir. Jan. 7, 1988) (Gen. Docket No. 84-1234 [including FCC Docket Nos. 89-181, 89-182, 89-183] consolidated on appeal with AvSat, File No. CSS-87-015(7) [FCC Docket No. 89-184] and previously filed appeals. *See infra* notes 5, 6, & 8).

[5] Memorandum Opinion and Order, In the Matter of Amendment of Parts 2, 22, and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, Gen. Docket No. 84-1234, 4 FCC Rcd 6029 (1989) (FCC 89-182), *appeal docketed, see supra* note 4.

[6] Memorandum Opinion, Order and Authorization, In the Matter of Amendment of Parts 2, 22, and 25 of the Commission's Rules to Allocate Spectrum for and Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, Gen. Docket No. 84-1234, 4 FCC Rcd 6041 (1989) (FCC 89-183) ("Authorization Order"), *appeal docketed, see supra* note 4.

[7] The Mobile Satellite Service is a generic satellite service consisting of the Land Mobile Satellite Service (LMSS), the Aeronautical Mobile Satellite Service (AMSS), and the Maritime Mobile Satellite Service (MMSS). 4 FCC Rcd at 6016 n.3. AMSS(R) is a Mobile Satellite Service in which the mobile station is aboard aircraft. The (R) designation indicates that the

spectrum is reserved for aeronautical communications related to the safety and regularity of flight. Authorization Order, 4 FCC Rcd at 6041 n.6.

[8] Memorandum Opinion and Order, In the Matter of Aeronautical Radio, Inc. For authority to construct an aviation satellite system (AvSat), File No. CSS-87-015(7), 4 FCC Rcd 6067 (1989) (FCC 89-184), *appeal docketed*, *see supra* note 4.

[9] Report and Order, In the Matter of Provision of Aeronautical Services via the Inmarsat System [File No. CSS 86-005-M(2)] and Application for Authority to Participate in an Inmarsat Program to Provide for Aeronautical Bandwidth on Second Generation Satellites, CC Docket No. 87-75, 4 FCC Rcd 6072 (1989) (FCC 89-185).

[10] Public Notice 1233, released January 9, 1990.

[11] Petition for Waiver, 3.

[12] *See supra* note 7 (definition of AMSS(R)). *See also* 47 C.F.R. § 2.1 (domestic definition); ITU Radio Regulations, art. 1 § 3.16 (international definition).

[13] *See* Communications Act of 1934, as amended, 47 U.S.C. § 151 (Purposes of Act). The provision relating to the promotion of safety of life and property was added by Pub. L. No. 97, 50 Stat. 189 (75th Congress (1937)).

[14] *See* 4 FCC Rcd at 6048 n.100.

[15] The Commission has already determined that expeditious implementation of aeronautical mobile satellite communications is desirable. *See* Report and Order, CC Docket No. 87-75, 4 FCC Rcd at 6087.

[16] An 'Aircraft Earth Station' is, "A mobile earth station in the aeronautical mobile-satellite service located on board an aircraft." 47 C.F.R. § 2.1 (Terms and definitions); ITU *Radio Regulations*, art. 1 § 4.22.

[17] *Cf.* 47 C.F.R. § 80.203(f).

[18] Petition for Waiver, 7.

[19] 4 FCC Rcd at 6086 n.73.

[20] The Commission's Rules also permit use of spectrum allocated to another service provided that no harmful interference is caused to existing services assigned to the band. 47 C.F.R. § 2.102 (Assignment of frequencies).

[21] The Commission has before it approximately thirty interrelated matters involving various aspects of mobile satellite communications including technical standards, facilities and service authorizations, and tariff filings.

[22] Common Carrier File Nos. SP-90-001 and 10-DSS-MISC-90.

[23] *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

[24] *See* 47 C.F.R. § 80.312 (Priority of distress transmissions). *See also id.* at § 80.91 (Order of priority of communications).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Waiver of Parts 2 and 97
of the Rules Concerning
Frequency Sharing
Requirements Applicable to
the Amateur Service in
Portions of Colorado and
Wyoming.

ORDER

Adopted: May 9, 1990; Released: May 16, 1990

By the Chief, Private Radio Bureau and Chief Engineer:

I. INTRODUCTION

1. This Order waives Part 2 (47 C.F.R. Part 2) and Part 97 (47 C.F.R. Part 97) of the Rules concerning the frequency sharing requirements applicable to transmissions in the 33 centimeter (cm) band by amateur stations located in portions of the states of Colorado and Wyoming.[1] This action was initiated by a request for rule waiver and Special Temporary Authorization (application) filed by Mr. Whit Brown on behalf of the Colorado Council of Amateur Radio Clubs (Council).

II. BACKGROUND

2. On July 18, 1989, the Council requested that amateur stations within the now restricted area of Colorado be authorized to use the 33 cm band. In support of its request, the Council states that grant of its application would help relieve current congestion on other amateur service bands by accommodating numerous requests for repeater channels, would allow linking of stations within Colorado and would allow linking of stations in Colorado with stations in surrounding areas that do not fall under the prohibited use limitation of Section 97.303(g)(1). The Council also argues that a grant would allow the study of propagation characteristics within the uniquely-varying, mountainous terrain of Colorado.[2] According to the Council, its members have expended considerable time and effort in monitoring the 33 cm band and found no activity in the Denver, Colorado area. [3]

III. DISCUSSION

3. The issue presented is whether the restriction on 33 cm band transmissions from amateur stations located within the currently restricted portions of Colorado and Wyoming[4] is still appropriate. The current restriction on amateur station transmissions in this band originates in Footnote US267 to the Table of Frequency Allocations in Section 2.106 of the Commission's Rules.

4. A review of Government licensing records shows that various Government agencies still have fixed services in the 33 cm band that must be protected from interference. We are, therefore, unable to authorize amateur stations the use of this band to the extent requested by the Council.[5] We are able, however, to allow some use of this band in the restricted area. Discussions with the Government users indicate that amateur stations located in the restricted area can transmit within certain segments of the 33 cm band without causing interference to the Government fixed operations. These segments are 902.0-902.4, 902.6-904.3, 904.7-925.3, 925.7-927.3, and 927.7-928.0 MHz. We find that the Council has demonstrated good cause for a waiver of Section 2.106 Footnote US267 and Section 97.303(g) as to these segments and that waiver will not undermine the Government radio services that the rule seeks to protect.[6] Accordingly, we are waiving the rules to allow amateur stations in the portion of Colorado and Wyoming covered by Section 2.106 Footnote US267 and Section 97.303(g)(1) to transmit in these segments for an indefinite term. Such operations are still subject to the general restrictions specified in Section 97.303(g)(1).[7]

5. We have decided to resolve this issue at this time through a waiver of the rules rather than by a rule change because Government users in the 902-928 MHz band have indicated that they plan to move point-to-point microwave circuits currently located in this band to new fixed service bands when the new bands become available.[8] Once all Government fixed users operating in the 902-928 MHz band in the restricted area have changed frequencies, the Commission will consider removing the area restriction on amateur stations entirely.

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that effective July 2, 1990, Sections 2.106 and 97.303(g)(1) of the Commission's Rules, 47 C.F.R. §§ 2.106 and 97.303(g)(1) ARE WAIVED for an indefinite term to permit amateur stations within the restricted area of Colorado and Wyoming to transmit in the following segments of the 33 cm band: 902.0-902.4, 902.6-904.3, 904.7-925.3, 925.7-927.3, and 927.7-928.0 MHz. Use of the 33 cm band by amateur stations in the portion of Colorado and Wyoming covered by Section 2.106 Footnote US267 and Section 97.303(g)(1) must not cause harmful interference to, and will receive no protection from, any interference due to the operation of, industrial, scientific and medical devices, automatic vehicle monitoring systems or Government stations authorized in this band. Authority for this action is contained in Sections 0.241 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.241 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

FOOTNOTES

[1] The restriction applicable to amateur stations transmitting in the 33 cm band (902-928 MHz) in these two states is contained in Section 97.303(g)(1) of the Commission's Rules, 47 C.F.R. § 97.303(g)(1). This restriction originates in Section 2.106 of the Commission's Rules, 47 C.F.R. § 2.106, Footnote US267.

[2] The Council expresses interest in investigating the propagation effect of winter snow/ice freezing, glazing, and melting at these frequencies, and in presenting the results of these investigations in technical papers and at technical seminars.

[3] The Council concedes that the monitoring may not indicate all point-to-point or brief burst transmissions of other users of the 33 cm band. It states, however, that its monitoring has established the minimal activity on frequencies in this band in the Denver area.

[4] The relevant part of Section 97.303(g)(1) states:

> (1) No amateur station shall transmit from within the States of Colorado and Wyoming, bounded on the south by latitude 39^0 N, on the north by latitude 42^0 N, on the east by longitude 105^0 W, and on the west by longitude 108^0 W.

[5] The Council requested that we authorize amateur stations the use of 904.0-904.6 MHz for digital communications. Government users have indicated that the frequency range 904.3-904.7 MHz is required for Government fixed services.

[6] Thomas Radio Co. v. FCC, 716 F.2d 921 (D.C. Cir. 1983)

[7] This band is allocated on a secondary basis to the amateur service subject to not causing harmful interference to, and not receiving protection from any interference due to the operation of, industrial, scientific and medical devices, automatic vehicle monitoring systems or Government stations authorized in this band.

[8] *See* Second Report and Order, General Docket No. 82-243, 4 FCC Rcd 2012 (1989), for rules applicable to fixed service usage in the 932-935 MHz and 941-944 MHz bands; Memorandum Opinion and Order, General Docket No. 82-243, 5 FCC Rcd _____, (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 7, 1990

MCI COMMUNICATIONS CORPORATION SEEKS FCC CONSENT TO ACQUIRE TELECOM * USA, INC.

MCI Communications Corporation (MCI), MCI Capital, Inc. (MCICI) and Telecom*USA, Inc. (Telecom) and its shareholders have filed an application under Sections 214(a) and 310(d) of the Communications Act, 47 U.S.C. §§ 214(a), 310(d), for Commission consent to transfer control to MCI of radio licenses and certain Section 214 authorizations held by subsidiaries of Telecom. Pursuant to the applicants' merger agreement, and subject to FCC approval, MCICI, an indirect wholly-owned subsidiary of MCI will be merged into Telecom, which will be the surviving company. Current holders of Telecom shares, options and stock awards would receive an estimated $1.25 billion and Telecom would become a wholly-owned MCI subsidiary. The radio licenses and authorizations now held by Telecom's subsidiaries, SouthernNet of South Carolina, Inc., SouthernNet Systems, Inc., Teleconnect Long Distance Services & Systems Co., Teleconnect Company, Southland Telephone Company, and TS Communications, Inc., would continue to be held by those subsidiaries.

At the effective time of the merger, the shares of Telecom which had been issued and outstanding prior to the effective time will be converted into the right to receive cash at the rate of $42 per share. In addition, options to purchase shares of Telecom granted pursuant to Telecom's benefit plans will be cancelled prior to the effective time, and the holders of cancelled options will receive, for each share subject to an option, $42 in cash minus the options' exercise price. Also, restricted stock awards issued by Telecom will be cancelled prior to the effective time, and holders thereof will be entitled to receive $42 in cash for each share subject to such awards. Following the merger, there will be 1,000 shares of Telecom issued and outstanding, all of which will be owned by MCI.

MCI and Telecom said the proposed merger will strengthen their ability to provide high quality telecommunications services to the public and increase competition in the interexchange market, with resulting benefits to the public.

While the following file numbers have been assigned to various parts of the application, File No. ENF-90-08 has been assigned to this proceeding for purposes of overall reference and coordination. Applicants seek consent to transfer control over the following common carrier radio licenses:

Part 21 Point - to - Point Microwave Radio Licenses

13416-CF-TC-(20)-90 SouthernNet of South Carolina, Inc., consent to transfer control from Telecom*USA, Inc. (transferor) to MCI Communications Corporation (transferee), Stations WHQ807, WHQ808, WHQ809, WHQ810, WHQ811, WHQ812, WHQ813, WHQ814, WHO476, WHO475, WHO474, WHO473, WHO472, WLB274, WLB275, WLB276, WLB277, WLB278, WHO832, and WHO833.

13417-CF-TC-(21)-90 Teleconnect Long Distance Services & Systems Co. consent to transfer control from Telecom*USA, Inc. (transferor) to MCI Communications Corporation (transferee), Stations WLC929, WLC930, WLC931, WLC932, WLC933, WLC934, WLC935, WLC936, WLC937, WLC938, WLC939, WLC940, WLC941, WLC942, WLM781, WLC686, WLC687, WLM396, WLL474, WLL899, and WLL900.

13418-CF-TC-(10)-90 TS Communications, Inc. consent to transfer control from Telecom*USA, Inc. (transferor) to MCI Communications Corporation (transferee), Stations WLM801, WLM802, WLM803, WLM804, WLM805, WLM806, WLM807, WLM808, WLM809, and WLN838.

Part 22 Mobile Radio Licenses

23960-CD-TC-1-90 SouthernNet Systems, Inc. consent to transfer of control from Telecom*USA, Inc. (transferor) to MCI Communications Corporation (transferee), Stations KNKL868, KNKL885, KNKL870, KNKM397, KNKM398 and KNKM399 at various locations within the states of Florida, Alabama, Tennessee, Georgia, and Washington, D.C.

23963-CD-TC-1-90 Southland Telephone Company, consent to transfer of control from Telecom*USA, Inc. (transferor) to MCI Communications Corporation (transferee), Station KIY521 at Atmore, Alabama.[1]

23964-CD-TC-1-90 Teleconnect Long Distance Services and Systems Company, consent to transfer of control from Telecom*USA, Inc. (transferor) to MCI Communications Corporation (transferee), Stations KOR995, KNKB781, KPE256, KNKK744, KTS200, KDS316, KSA811, KUC846, KSD311, KEJ894, KEA274, KPA454, KNKI517, KRH676, KUS280, KLF508 at various locations within the states of CA, CT, IL, IN, MA, NJ, NY, OH, & PA.

05329-CL-TC-1-90 Consent to the transfer of control of Teleconnect Company, Station KNKN480 from Telecom*USA, Inc. to MCI Communications Corporation, Market 437A - Kansas 10 - Franklin RSA.

Section 214 Authorizations

I-T-C-90-098-(9)TC Applicants seek FCC consent to transfer control over nine international Section 214 authorizations.

GENERAL INFORMATION

The application has been found, upon initial review, to be acceptable for filing. The Commission reserves the right to return the application if, upon further examination, it is determined to be defective and not in conformance with the Commission's rules or policies.

Parties wishing to comment on this matter may do so no later than **June 8, 1990**. Reply comments should be filed no later than **June 29, 1990**. All filings concerning this matter should refer to File No. ENF-90-08. A copy of the application and any subsequently filed documents in this matter may be obtained from International Transcription Services, Inc. 2100 "M" Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. The application and documents are also available for inspection and copy-

ing in Room 6206, 2025 "M" Street, N.W., Washington, D.C. 20554. For further information, contact Adrien Auger at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTE

[1] Telecom has entered into an agreement with Rochester Telephone Company (Rochester) under which Rochester, subject to FCC approval, will purchase all of the stock of Southland Telephone Company (Southland). MCI and Telecom seek contingent authority for the transfer of control of the licenses held by Southland in the event that the proposed acquisition of Southland by Rochester (File No. 24023-CD-TC-1-90 consent to transfer of control from Southland Communications Corporation to Rochester) has not been closed by the effective date of the Telecom/MCI merger.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-357

In re Applications of

SWAN BROADCASTING LIMITED	File No. BPCT-870717KQ
CRESCENT CITY BROADCASTING CORPORATION	File No. BPCT-880419KE
DELTA BROADCASTING OF LOUISIANA, LTD.	File No. BPCT-880419KF
Robert H. and Janee M. Tucker d/b/a TUCKER BROADCASTING COMPANY, LIMITED PARTNERSHIP	File No. BPCT-880419KG

For Construction Permit for a
New Commercial Television Station on
Channel 20, New Orleans, Louisiana

Appearances

Leo I. George, Pamela C. Cooper, Theresa A. Zeterberg on behalf of Swan Broadcasting Limited; *DeWitt Conklin* on behalf of Crescent City Broadcasting; *Jeffrey D. Southmayd* and *Michael R. Miller* on behalf of Delta Broadcasting of Louisiana, Ltd.; *Bradford D. Carey, Marjorie R. Esman,* and *Craig E. Frosch* on behalf of Robert H. and Janee M. Tucker, d/b/a Tucker Broadcasting Company, Limited Partnership.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN [1]

Issued: May 1, 1990; Released: May 16, 1990

1. The four applications in the caption and two others, now dismissed, were designated for a hearing to consider on a comparative basis which proposal would best serve the public interest in operating commercial television Channel 20 at New Orleans, Louisiana. *Hearing Designation Order*, 3 FCC Rcd 4751 (1988). The following issues remain to be decided in this decision:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

2. A prehearing conference was held on October 13, 1988. Tr. 1-10. The written testimony was exchanged on April 25, 1989 and hearing sessions were held on December 11, Tr. 11-294, and December 12, 1989, Tr. 295-397, and the record was closed on December 12, 1989. *Order*, FCC 89M-2773, released December 14, 1989, and reopened and closed on March 21, 1990. *Memorandum Opinion and Order*, FCC 90M-602, released March 23, 1990.

FINDINGS OF FACT

Comparison of the Applicants

Full - time participation in station operation by owners.

3. *Swan* is a limited partnership with three partners, Marian M. Vaccari, who is the only general partner, and Harold and Marilyn Erbs, who are limited partners who own 30% of the equity. Swan Exh. 1, at 1. Ms. Vaccari owns 70% of the equity and she proposes to work full time, 40 hours per week, as the general manager of the proposed station. Swan Exh. 2, at 1. She will superintend all aspects of the station's operations. *Id.* She will oversee sales, programming, personnel, engineering and administration. *Id.* All department heads will report to her. She will hire and fire, and she will insure the station complies with the Commission's regulatory requirements. Ms. Vaccari has lived in New Orleans since 1979. *Id.* In 1989, she participated in organizing a halfway house for alcoholic women and she has sponsored persons in AA. *Id.*, at 2. She belongs to a political party and a church, contributes to the zoo and the arts and is entitled to female credit. *Id.*, at 2-3.

4. Ms. Vaccari asked Harold Erbs to find a business investment in New Orleans for her and he suggested applying for this channel. Tr. 53. He gave her the name of communications counsel to find out about the application. Tr. 64. Mr. Erbs also suggested an engineer. Tr. 40.

5. *Crescent City* is a nonprofit, nonstock corporation. Crescent Exh. 1, at 1. While Crescent City claimed at the hearing that it had two principals, M. Chadwick Pellerin and DeAnn Gruber, the Commission's records reflect a third principal, Charlotte Stewart. Crescent Exh. 1, at 1; *Memorandum Opinion and Order*, FCC 90M-602, released March 23, 1990, at ¶ 6. On June 3, 1988, Crescent City represented that M. Chadwick Pellerin was president and held 33 1/3% control, that DeAnn Gruber was treasurer with 33 1/3% control, and that Charlotte Stewart was secretary with 33 1/3% control. That amendment, which added DeAnn Gruber, was filed pursuant to §73.3522(a)(2), as a matter of right. On September 8, 1988, Crescent City filed a petition for leave to amend where it was represented, *inter alia*, that "Charlotte Steward" had resigned. No amendment was filed, however, and the Commission's records reflect that Crescent City is controlled by the same persons who controlled from June 3, 1988.[2]

6. Crescent City states that its board members will have responsibility for establishing station policies which will be implemented by a paid management. Crescent Exh. 3, at 11. The staff will be subject to the Board's supervision and oversight. *Id.* The two board members listed in the exhibits will "dedicate as much time as will be necessary" and participation will "vary from time to time." *Id.* Sometimes it may require 20 hours per week or more, at other times less. *Id.* The board members will not give up their current employment but, to the extent necessary, they may withdraw from their civic activities. *Id.*, at 12.

7. *Delta* is a limited partnership with one general partner, John G. Curren, Jr., and three limited partners, Michael J. Barnes, Peter D. Carnes, and George S. Castellaw. Delta Exh. 1, at 1. Messrs. Curren and Barnes each own 33 1/3% of the equity, Mr. Carnes owns 17% of the equity, and Mr. Castellaw owns 16 1/3%. *Id.* Mr. Curren proposes to work full time, 40 hours per week, as the general manager. Delta Exh. 2, at 1. He will have final authority for all station activities. *Id.* Except for the periods September 1976 to April 1979 and January 1985 to May 1986, Mr. Curren has lived in New Orleans since 1941. *Id.* He has worked at broadcast stations since 1968. *Id.*, at 1-2. He belongs to the Rotary Club, participates in the United Way Campaign, New Orleans Ad Club, Ducks Unlimited, and Gulf Coast Conservation Association. *Id.* at 2.

8. *Tucker* is a limited partnership with two general partners, Robert H. Tucker, Jr. and Janee M. Tucker, who each own 16.25% of the equity, and two limited partners, William L. Demory and David C. Treen, who each own 33.33% of the equity. Tucker Exh. 1, at 2. Mr. Tucker will work at the station full time, 40 hours per week, as the general manager. Tucker Exh. 2, at 1. He will supervise the station manager and have overall responsibility for station policy. *Id.* Mr. Tucker has lived in New Orleans since 1941, all his life. *Id.*, at 2; Tucker Exh. 4, at 1. Mr. Tucker lists 32 civic activities, some of which he has participated in since 1970; he continues to be involved in many activities. Tucker Exh. 4, at 2-6. He is an African American. Tucker Exh. 4, at 6. During 1971-72, he was the host of a 30 minute public affairs program on WDSU-TV, New Orleans. *Id.*

9. Janee Tucker represents that she will work full time, 40 hours per week, as the station manager. Tucker Exh. 2, at 1. She will oversee the station's operations and programming. *Id.* Except during 1962 to 1976, Ms. Tucker has lived in New Orleans since 1946. Tucker Exh. 2, at 2; Tucker Exh. 5, at 1. Ms. Tucker was a special report newscaster on Channel 5, KTLA-TV. Tucker Exh. 5, at 6. She is a female African American. Tucker Exh. 5, at 7.

Diversification of control of the media of mass communications

10. Neither Swan nor any of its principals hold ownership interests in the media of mass communications. Swan Exh. 3, at 1. Crescent City and its board members do not hold mass media interests. Crescent City Exh. 2. None of Delta's principals nor Delta hold any ownership interest in the media of mass communications. Delta Exh. 1, at 2. The spouse of Delta's limited partner Peter Carnes, Linden Carnes, is an officer, director, and 11% shareholder of Big Bend Broadcasting Corporation, licensee of WBSZ(AM), Bennettsville, South Carolina. She has committed to divest herself of her interest if Delta's application is granted. Delta Exh. 1, at 2. Neither Tucker nor its partners have any interest in the media of mass communications. Tucker Exh. 3.

CONCLUSIONS

Full - time participation in station operation by owners

Quantitative attributes

11. *Crescent City* is a nonprofit, nonstock corporation that is to be governed by a board of directors. At the hearing Crescent City claimed it had two directors, DeAnn Gruber and M. Chadwick Pellerin but, on June 3, 1988, Crescent City represented that there was a third director, Charlotte Stewart. On September 8, 1988, Crescent City notified the Commission that Charlotte Stewart had resigned and that it was going to amend its application. The amendment was not filed until April 9, 1990. Because the amendment changes 50% of Crescent City's ownership, Crescent City has been given until 15 days after release of this decision to withdraw its amendment changing ownership or its application will be dismissed.

12. While Crescent City claims participation credit for Pellerin and Gruber, the record does not support a conclusion that they will "actively participate in the day-to-day operation of the station." *Policy Statement on Comparative Broadcast Hearing*, 1 F.C.C.2d 393, 395 (1965). Although an applicant may receive credit for less than full-time participation, the credit received will "drop sharply" and "any person who will not devote . . . substantial amounts of time on a daily basis" will be given no credit. *Id.* Crescent City's principals have not provided any assurance that they will devote any time on a daily basis to the operation of the station. The promises made by Gruber and Pellerin are made in vague generalities. They say they will not give up their current employment and their promise is only to spend "as much time as will be necessary." There is no question that under Crescent City's plan, the station will be operated by paid management. For its position, Crescent City relies on *Omaha TV 15*, 4 FCC Rcd 730, 732-33 (1988) where the Commission held that physical presence of a manager at the station is not required, and that the judgement about whether an owner-manager will be present at the station is one for the licensee to make. But that does not mean that those who control need not promise to manage. In addition, in *Omaha TV 15* the Commission held that a principal must be present "on a regular, periodic basis." *Id.*, at 733. Crescent City has not put forward a plan for the regular, periodic presence of its board members at the station. The Commission also assumed that the owner of a station would "manage a station on a day-to-day basis." *Id.*, at 733. The applicant, Channel 15, in *Omaha TV 15* proposed that its principal, Tyler, would work 30 hours per week and he would "spread those 30 hours over three days." *Id.* Pellerin and Gruber have not put forth a similar proposal to be present as managers on a regular, periodic basis and they are not entitled to any integration credit.

13. *Swan's* general partner, Marian M. Vaccari, proposes to work full time, 40 hours per week, as the general manager of the station. She stated that she will oversee all of the station's operations. This will include personnel, programming, engineering and administration depart-

ments. She will hire and fire, insure compliance with regulatory requirements, and have all department heads report to her. She is entitled to 100% integration credit for combining her complete control of the applicant with her full-time participation in the management of the station.

14. Delta and Crescent urge that Ms. Vaccari's promise should not be credited because she has little understanding of her role at the station, with no clear idea of how she plans to be involved in any particular aspect of the management. Their arguments are not supported by the record. Ms. Vaccari, as the foregoing conclusions demonstrate, spelled out in some detail her role at the station. Delta and Crescent rely on transcript page 31 where Ms. Vaccari said she did not know exactly how she would be involved with any particular department. The import of the question appears to contain an expectation that Ms. Vaccari should provide details about how she would act on a day-to-day basis. A few pages earlier in the transcript she explained her role when she was asked her duties, Tr. 27-28; she added further specificity as the questions became more pointed, Tr. 29, and she explained that she had even given some thought to what type of programming the station would carry. Tr. 30. The question which Delta and Crescent cite was unanswerable because it was too vague; it certainly would not form a basis for discrediting Ms. Vaccari's promise. There is no requirement that applicants have broadcast experience or that they be able to list possible problems that might arise. Ms. Vaccari did explain in sufficient detail what she would do. It cannot be concluded that Ms. Vaccari did not know what she would do at the station.

15. Crescent would also hold Ms. Vaccari's lack of broadcast experience against her and her failure to have been employed outside her family business. Crescent provides no authority for either proposition. The fact that Ms. Vaccari does not have broadcast experience works against her qualitative proposal, not her quantitative proposal, and then only if other applicants have broadcast experience.[3]

16. Tucker, Crescent, and Delta also urge that Ms. Vaccari is not in complete control of the applicant. Delta believes this is illustrated by Ms. Vaccari's inability to exhibit "substantial knowledge" about the partnership agreement. Tucker and Delta urge that limited partner Harold Erbs participated in various activities involving the applicant; they claim he suggested a counsel and an engineer, exchanged telephone calls with Ms. Vaccari twice a month, "recruited" her for the proposal, and provided her with financial advice. Tucker describes Erbs' involvement as "intimate" and Delta maintains Erbs' participation shows a likelihood that he will be involved in station affairs.

17. Ms. Vaccari did learn about her counsel, Leo George, from Mr. Erbs. Tr. 64. And it was Mr. Erbs who initially told her about the availability of the New Orleans' channel. Tr. 53. Ms. Vaccari explained that Mr. Erbs helped her with her financial settlement when her spouse died. She asked him if he could find her something she could be active in in New Orleans. *Id.* She has known Mr. Erbs since about 1954. From 1987 to the present, Ms. Vaccari stated, she has met with Mr. Erbs about three times and she talks with him on the telephone twice a month. Those conversations have involved "very little" about Channel 20, she said; they are mainly about her financial investments, for which she pays him a fee for his advice, or about personal and social matters involving their families. Tr. 66-67. Mr. Erbs also suggested to Ms. Vaccari that she contact Turnkey Engineering in Dallas about arranging for a tower. Tr. 39-40. Ms. Vaccari said, however, that Mr. Erbs did not have anything to do with obtaining the antenna site. Tr. 40. Delta introduced a letter from Turnkey Engineering to Harold Erbs, Delta Exh. 3, in which Turnkey informed him about the search for a site on the "Marian N. Vaccari Project" and asked him if he wanted Turnkey to find other possible locations.

18. While it is apparent that Harold Erbs has had some involvement in the development of the proposal, it does not appear that his involvement has been "intimate" or many faceted as Tucker urges. There is no evidence that beyond suggesting Mr. George, that Mr. Erbs conferred with Mr. George or made decisions about the proposal. Ms. Vaccari states that she has done that. There is evidence that Turnkey wrote to Mr. Erbs but there is no explanation in the record about the circumstances under which they did so. Ms. Vaccari maintains that she consulted with Turnkey. There are other facts which argue against assuming Mr. Erbs will be actively involved in the operation of the station. While Mr. Erbs does provide Ms. Vaccari with financial advice in other areas, he provides advice when paid a fee. There is no evidence that he will have a similar arrangement with her if Swan operates Channel 20. Ms. Vaccari holds 70% of Swan's equity and she lives in New Orleans while Mr. Erbs lives in Houston, Texas and shares 30% of the equity with his spouse. There is no evidence that Mr. Erbs has an interest in operating a business in New Orleans and Ms. Vaccari appears well suited to operate one there. She is, after all, shouldering most of the financial risk. Mr. Erbs and his spouse hold a small interest and could not expect to direct the affairs of the partnership, even if they were not prohibited from such participation by the partnership agreement.[4]

19. Tucker argues that Swan's integration proposal cannot be credited because all the partners had not signed the partnership agreement on the B cutoff day. Swan's partnership agreement was made on June 3, 1988. Swan Exh. 4. That was the B cutoff date. Ms. Vaccari testified that she believed she had signed the agreement when it was made and there is no evidence that the Erbs did not also sign before the B cutoff day. In any event, the Commission stated in *Victory Media, Inc.*, 3 FCC Rcd 2073, 2074 (1989) that "current Commission precedent does not require written documentation of an applicant's ownership structure on the B cut-off date." While Tucker argues that the Commission's holding in *Victory Media* does not apply to partnerships, that is not the case. The Commission stated there, by way of example for its holding, that it "fully credited an integration proposal [for a partnership] even though [the] partnership agreement [was] not executed until after the time for filing amendments as a matter of right." *Id.* (citations omitted). Swan has always indicated to the Commission from the day it filed its application that Ms. Vaccari would exercise full control. There is no evidence that her control was not agreed to by the partners in writing on the B cutoff date.

20. *Delta* is a limited partnership with one general partner, John G. Curren, Jr. Mr. Curren owns 33 1/3% of the equity and the remaining equity is held by three limited partners. Mr. Curren proposes to work full time, 40 hours per week, as the general manager of the station. He will have final authority for all station activities.

21. Swan urges that Delta should not be given any integration credit because it falsely certified its financial qualifications. That issue has been fully considered and found to be without merit. *Memorandum Opinion and Order*, FCC 90M-602, released March 23, 1990, at ¶¶ 15-17.

22. Tucker urges that Delta's partnership agreement was not signed by the B cutoff date, June 3, 1988. While it appears that Delta's agreement was signed by the B cutoff, if that were not the case, that fact alone would not prohibit Delta from receiving integration credit. *Victory Media, Inc., supra*, 3 FCC Rcd 2073, 2074. The Delta partnership agreement states on its face that the partnership was organized on June 3, 1988 and the certificate from the Louisiana Secretary of State indicates that it was filed on June 7, 1988 and became effective on June 3, 1988. Delta Exh. 1, Attachment A. The signatures are dated June 3, 1988. Tucker has not submitted any evidence that the dates are inaccurate; it asserts that the timing for the signatures is improbable since the signatories do not live at the same location. Transport of documents and the methods used for signing documents has changed significantly and it is not evident that the timing indicated on the face of the document is impossible. In any event, it is apparent that the partnership agreement was fully signed by June 7, 1988, because on that day it was filed with the State of Louisiana.

23. Tucker argues that John Curren's integration pledge should be diminished because limited partner Peter Carnes informed Mr. Curren about the channel, the applicant is represented by a lawyer who has represented Mr. Carnes, Curren discussed the selection of a site and engineer with Carnes, and the limited partners spoke with Mr. Curren and apparently counsel about the proposal. The record reflects that Mr. Curren knew and had worked with Mr. Carnes and limited partner Peter Castellaw and that Mr. Carnes and limited partner Michael J. Barnes knew each other. Mr. Barnes has been a limited partner in a number of broadcast proposals.

24. Mr. Curren explained that Peter Carnes called him and asked him whether he had filed for New Orleans Channel 20. He did so because Mr. Carnes knew that Mr. Curren had an interest in filing for a facility in the New Orleans market. Tr. 156. It can hardly be said from that conversation that Mr. Carnes initiated the proposal or informed Mr. Curren about the channel. Tucker's claim that Mr. Carnes selected counsel is not substantiated. Mr. Curren did testify that the partners discussed the site and engineer. But the engineer was selected by Delta's counsel, as is so often the case. Tr. 175. Mr. Curren also testified that the partners infrequently spoke on the telephone with him but when they did talk, the conversations were about the status of the proceeding. Tr. 172. Tucker's allegations at most demonstrate organizational activities -- in which the partners defined their interests and were informed about the proposal they were investing in. *See Victory Media, Inc., supra*, 3 FCC Rcd 2073. In more cases than one, Tucker has misstated the record about Delta's proposal. Swan argues that it is unbelievable that Mr. Curren will work at the station because he lacks knowledge about how the partnership agreement was prepared. Mr. Curren stated that the partnership agreement was prepared by counsel in New Orleans and that he was familiar with it. Tr. 172-73. The lawyer in New Orleans is Mr. Curren's personal attorney. Tr. 173. Mr. Curren said that he did not know if the limited partners were involved in writing the partnership document but that he believed he was the only partner that was. Tr. 174.

25. Delta's proposal is in contrast to those where the Commission has found that the limited partnership arrangement was a sham. Mr. Curren not only lives in New Orleans, he was born there. He has substantial television experience and it is unrefuted that he was interested in applying for a facility there. Furthermore, Mr. Curren arranged for the financing and has a substantial 33 1/3% equity interest in the applicant. There is no evidence that he has not made the decisions with counsel about the proposal. The limited partners do not live in New Orleans and there is no evidence that they intend to control the station's operation. There is no reason to diminish Delta's 100% integration of ownership and management proposal.[5]

26. *Tucker* is a limited partnership with two general partners, Robert H. Tucker, Jr., and his spouse, Janee M. Tucker. They each own 16.25% of the equity. There are two limited partners, Willard L. Demory and David C. Treen, who each own 33.33% of the equity. The Tuckers propose to work at the station full time, 40 hours per week. Robert Tucker would be the general manager and supervise the station manager and have overall responsibility for policy. Janee Tucker proposes to become the station manager. She would oversee the station's operations and programming.

27. Swan and Delta urge that Janee Tucker's promise cannot be credited because at the time she made the promise, she was and is obligated under government contracts she received as part of a Small Business Administration program to work full time, without outside employment, at the consulting firm she controls, Tucker and Associates, Inc. (TAI). Ms. Tucker is president and Chief Operating Officer, and 51% owner of Tucker and Associates, Inc. Tucker Exh. 5, at 1. While Ms. Tucker stated in her testimony that she would resign from TAI, *id.*, she made no mention of her obligation to the SBA program or how she could comply with the absolute prohibition under the SBA program against outside employment and still meet her promise to the Commission. The SBA Section 8(a) program, as the Board pointed out in *Knoxville Broadcasting Corp.*, 103 F.C.C.2d 669, 680 (1986) requires that the individual who brings eligibility to the firm work full time at the business without outside employment.

28. Not only did Ms. Tucker fail to reveal her conflicting promises, she took no steps to explain how she could accomplish both promises and still meet her legal obligations to the SBA and the Commission. The Tuckers testified that Ms. Tucker now spends 40 to 50 hours per week at TAI. Tr. 322-23, 360. The vast majority of TAI's business, the Tuckers testified, is done pursuant to government contracts. Tr. 339, 375. The business is very successful, they stated, and produces a significant income. Tr. 321, 323, 360. Ms. Tucker testified that TAI must meet SBA requirements. Tr. 377. The business has 200 full-time employees but of these employees only Mr. and Ms. Tucker and two other employees serve as contacts with TAI's clients. Tr. 321, 378, 361. Mr. Tucker said that if a grant is made he would continue at TAI in order to "sustain" the business until the station is operational. Tr. 323-26, 333-34. He pointed out that he will remain at TAI until the station is operating because he is not "suicidal as a business person." Tr. 325. Neither of the Tuckers have

promised to sell their interests in TAI if they receive a grant. Tr. 324, 344, 362, 363. They do not plan to even hire anyone to take their places, even though Mr. Tucker now works 55-60 hours per week at TAI and Ms. Tucker works 40 to 50 hours. Tr. 321-22, 324. They intend to delegate their jobs to existing management personnel. Tr. 324, 365.

29. After the hearing, in light of the foregoing testimony, Delta submitted two exhibits as rebuttal for these claims. They were received into evidence. All the parties addressed the exhibits as part of the record in the proposed findings and Tucker was provided with an opportunity to respond to Delta's request to accept the exhibits. Delta Exhibit 5 shows that Ms. Tucker renewed her SBA Section 8(a) certification on December 17, 1989, following the hearing. The effect of that claim was to represent that she would work full time at TAI without outside employment. When Ms. Tucker was asked at the hearing whether the SBA required her to maintain her ownership in TAI, she said it did not to her knowledge. Tr. 377. Nevertheless, she said she would continue to own 51% of TAI. Tr. 377. Mr. Tucker left little doubt that the major government contracts they had obtained (which he said had "multi implications to it"), would be important to the future of the business if it is operated with "senior management personnel." Tr. 323-24. Delta Exhibit 4 shows that TAI has maintained its SBA Section 8(a) status since 1980 and that its current certification is good until late 1990. Delta Exhibit 4 shows that TAI has a Department of Energy contract for $755,000 that will not be completed until December 27, 1990. Delta Exhibit 5 shows that two weeks after she testified in this proceeding Ms. Tucker certified that TAI was in compliance with Section 8(a) and that she indicated to the SBA her intention to maintain compliance with Section 8(a).

30. Tucker argues that it should have an opportunity now to cross examine the author of Delta Exhs. 4 and 5. Tucker had an opportunity to respond and submitted no statement whatsoever from the Tuckers. Delta Exh. 5, after all, was a letter written by Ms. Tucker and Delta Exh. 4 is about TAI's SBA status which Tucker concedes. Tucker glibly maintained in its filing that Tucker intended to use the Commission's rules to keep from building and operating the station immediately, apparently in order to keep its ongoing, large and successful business as a government contractor from violating SBA regulations. It is clearly the sort of frantic reasoning that an applicant who has been caught in a lie might come up with. Janee Tucker is not entitled to integration credit because she has another legal obligation to work full time without outside employment and, therefore, her promise here is not reliable. Mr. Tucker's promise must also be discounted because he admits he is not suicidal and must maintain his existing business which has 200 employees.

Qualitative attributes

31. Swan and Delta have proposed and been credited with sufficient quantitative integration to warrant consideration of their qualitative attributes. Swan's Marian Vaccari has lived in New Orleans since 1979; she has participated in activities that indicate a knowledge of and an interest in the welfare of the community; and she is entitled to female credit. Delta urges that Ms. Vaccari's local residence should be reduced by the time she spent in jail. In making that argument Delta does not explain where or how long Ms. Vaccari was in jail. The record does reflect that Ms. Vaccari was pardoned of the crime she committed. Tucker argues that Ms. Vaccari's contributions to the zoo and the arts are not entitled any credit because it does not relate to "ascertainment of community needs and problems." Delta cites no authority for its factually unsupported claim. Even if it were supported, the argument would fail because Tucker's claim is contrary to the *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 395 (1965) which provides credit for activities that evidence an interest in the welfare of the community that are unrelated to the principal's business interests. Ms. Vaccari's support of the zoo and the arts could be said to show an interest in community welfare. In order to contribute she had to know of the organizations' needs; once she knew about them, she took the next step and helped to meet them.

32. Delta's John Curren also lives in New Orleans. He has lived there since 1941 except for the three years from 1976 to 1979 and for a year and five months from January 1985 to May 1986. Mr. Curren has also participated in community activities which show a knowledge of and interest in the welfare of the community. He has worked at broadcast stations since 1968.

33. While their activities have been different, John Curren and Marian Vaccari have shown about the same degree of interest in the community. However, their local residence differs in the length of time they have lived in New Orleans. Mr. Curren has lived there approximately 34 years and Ms. Vaccari has lived in the community for about the last ten years. Mr. Curren's essentially lifetime local residence warrants a greater preference because it indicates a "likelihood of continuing knowledge of changing local interests and needs." *See Colonial Communications, Inc.*, FCC 90R-20, Review Bd. released March 30, 1990, at ¶ 8. Ms. Vaccari receives a preference for her female status because of the impact that will have on the diversity of programming in the community. Mr. Curren is entitled to credit for his 22 years in broadcasting, much of which is local. Ms. Vaccari's female preference is not given as much weight as local residence and when Mr. Curren's much longer residence is combined with his broadcast experience, Delta is to be slightly preferred over Swan.

Diversification of control of the media of mass communications

34. None of the applicants have mass media interests. The spouse of one of Delta's limited partners has an 11% interest in a radio broadcast station in Bennettsville, South Carolina. She has promised to divest her interest. The comparatively best applicant in this proceeding is Delta because of its slightly better qualitative integration proposal.

ACCORDINGLY, IT IS ORDERED that the motion to file one day late, filed January 25, 1990 by Crescent City Broadcasting Corporation IS GRANTED.

IT IS FURTHER ORDERED that the motion for extension of time, filed April 5, 1990 by Crescent City Broadcasting Company IS DENIED.

IT IS FURTHER ORDERED that the request for acceptance of late filed pleading, filed April 9, 1990 by Crescent City Broadcasting Corporation IS GRANTED and the petition for leave to amend, filed April 9, 1990 by

Crescent City Broadcasting Corporation IS HELD IN ABEYANCE until 15 days following release of this decision.

IT IS FURTHER ORDERED that the applications of Crescent City Broadcasting Corporation (File No. BPCT-880419KE), Robert H. and Janee M. Tucker d/b/a Tucker Broadcasting Company Limited Partnership (File No. BPCT-880419KG), and Swan Broadcasting Limited (File No. BPCT-87071KQ) ARE DENIED WITH PREJUDICE and the application of Delta Broadcasting of Louisiana, Ltd. (File No. BPCT-880419KF) for a construction permit for a commercial UHF television facility to operate on Channel 20 at New Orleans, Louisiana IS GRANTED provided Linden Carnes divests her interest in WBSZ(AM), Bennettsville, South Carolina before program test authority is granted and John G. Curren divests his interest in his broadcast proposal for Greer, South Carolina.[6]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] Until July 27, 1989, the presiding officer in this case was Joseph P. Gonzalez. *Order*, FCC 89M-2005, released July 31, 1989.

[2] Crescent City was required to notify the Commission by March 30, 1990 whether it still intended to amend its ownership in light of the issues that have been raised about a transfer of 50% of its control. Crescent City did not respond until April 9, 1990 and represents that it did not receive the order until April 4, 1990 because its counsel moved to a new location. Crescent City is almost always late with any filing. Crescent City, in any event, has decided to file the amendment and urges that good cause exists for its acceptance. As already recounted, between June 3, 1988 and September 8, 1988, it transferred 50% of its control. On June 3, 1988, Crescent City added a new director, DeAnn Gruber, to its existing board of two directors. On September 8, 1988, one of the original directors resigned and Crescent City again had only two directors, one of whom, DeAnn Gruber, was not party to the application when it was filed. Thus, within a three month period, Crescent City abruptly (*e.g.* not in the normal course: when a board member's term expires and within a short period of time) changed 50% of its control. (Crescent City claims the changes were gradual but that is a misapplication of the term. *See Seven Locks Broadcasting Co.*, 94 F.C.C.2d 899 (1983); *Pacifica Foundation, Washington, D. C.*, 41 F.C.C.2d 71 (Rev. Bd. 1973).) Crescent City points out that everyone was apprised of its change in ownership in September 1988 and that it relied on the Commission's acceptance of the change. *Tequesta Television, Inc.*, 2 FCC Rcd 41, 42 (1987). Of course, the Commission never accepted the change because, while Crescent City gave notice that it had changed control, it never filed an amendment. Nevertheless, in consideration of its reliance on its notification to the Commission of the proposed change, Crescent City will be given 15 days from the release of this decision to withdraw its amendment and reinstate its control as of June 3, 1988, or its application will be dismissed. *Tequesta Television, Inc., supra.*

[3] Crescent relies on the Review Board's decision in *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948 (Rev. Bd. 1988) for the proposition that implausible promises are not credited. Aside from the fact that Crescent failed to provide the proper citation, it also failed to explain which factual situation analyzed by the Board in that case it believes controls this one. Delta's claim that Swan's proposal is vague and uncertain is equally imprecise. Delta relies on the Review Board's opinion in *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945 (Rev. Bd. 1989) for which it provided no reporter citation, let alone a reference to the part of the opinion it believes supports its assertion about the facts in this case. The *Marlin* opinion, like that in *Washoe*, is a detailed analysis of many proposals. Delta and Crescent do not forward their claims by their offhanded references.

[4] Delta would fault Ms. Vaccari for not knowing who "an affiliated person of the Limited Partners" would be as it is used in paragraph number 8 of the partnership agreement. Swan Exh. 4, at 5. *See e.g.* Tr. 67-78. She also did not appear to understand the provisions in the agreement that governed disposition of her interest. *Id.* Aside from those two areas, Ms. Vaccari was not asked about her understanding. Ms. Vaccari's knowledge of the technical provisions of the partnership agreement would be relevant if her control were compromised and the partnership agreement did not prohibit participation of the limited partners in the business of the partnership. Neither Tucker, whose counsel questioned Ms. Vaccari, nor Delta, who makes the argument about Ms. Vaccari's understanding of the agreement, urge that Swan's limited partners are not sufficiently insulated under the agreement. The clause about "affiliated persons" which Ms. Vaccari was questioned about, is defined as applying to corporate limited partners, of which Swan has none.

[5] Crescent City urges that Mr. Curren's integration proposal cannot be credited because he has applied for an FM facility in Greer, South Carolina. Crescent City points out that Mr. Curren has stated in this proceeding that he will withdraw from that proposal. Without any record support or support of any sort, Crescent City argues that allegedly Mr. Curren did not inform the Commission in the Greer proceeding about his intentions. Delta has not indicated what it said in the Greer proceeding or what Mr. Curren's interest is there. There is no record evidence on Crescent City's claims and Crescent City has not sought to introduce any. The record does reflect that Mr. Curren has represented that he will not pursue the Greer proposal if he is successful in obtaining Channel 20.

[6] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-208

In re Applications of

ENGINEER BROADCASTING (hereafter "Engineer") File No. BPH-880322MA

ESTILL COUNTY BROADCASTING, INC. (hereafter "Estill") File No. BPH-880323ML

KENTUCKY RIVER BROADCASTING, CO., INC. (hereafter " KY River") File No. BPH-880324ME

For Construction Permit
for a New FM Station on Channel
291A Irvine, Kentucky

HEARING DESIGNATION ORDER

Adopted: March 30, 1990; Released: May 16, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Engineer.* In its application as amended, Engineer indicates that the proposed antenna will be located on an existing tower supporting various VHF and UHF mobile communications antenna for Domestic Public Land Mobile stations KNCL 614, KNFW 763, and KNET 945. Engineer lists the coordinates for this tower as 37^0 43' 32" NL, 83^0 56' 49" WL. However, Commission records actually list this tower as being located at 37^0 43' 32" NL, 83^0 56' 53" WL. In addition, Commission records show the tower structure height as being 27 meters above ground level, and not 37 meters as indicated by Engineer. Since Engineer clearly proposes to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in the application in question, the staff could "drawing on the application as a whole", confidently verify the transmitter location and tower height by taking official notice of the site coordinates and tower height as found in the Commission's files for the licensed colocated facilities. Accordingly, Engineer's application was found to be acceptable for filing. However, Engineer shall be required to file a corrective amendment to its application with the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *Estill.* On June 24, 1988, Estill filed an amendment prior to the close of the filing window proposing to move the transmitter site 0.634 kilometers west of the originally proposed site. Estill failed to include (1) a new certification of site availability and (2) a city-grade coverage map with its amendment. Since subsequent amendments are not required to conform to the tenderability requirements, Estill's omissions are not fatal defects and may be rectified with an appropriate amendment. *See, Tabor Broadcasting Company*, 4 FCC Rcd 7892 (1989). Estill will be required to file within 30 days of the release of this Order a site certification and a city coverage map with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

4. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Estill and KY River have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Estill and KY River would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Estill and KY River would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, that Engineer file an amendment clarifying discrepancies to its application with the presiding Administrative Law Judge within 30 days of the release of this Order regarding the coordinates and structure height of its proposed tower.

9. IT IS FURTHER ORDERED, that Estill file a corrective amendment to its application with the president Administrative Law Judge within 30 days of the release of this Order regarding the city-grade coverage map and certification of site availability.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-1
Phase II

In the Matter of

Annual 1988 Access Tariff Filings

GTE Operating Companies

ERRATUM

Released: May 10, 1990

1. On April 30, 1990, the Common Carrier Bureau released an Order, DA 90-645, in the the above-captioned proceeding. The first sentence of paragraph 6 of that Order should be corrected to read as follows:

> Accordingly, IT IS ORDERED pursuant to Section 4(j) of the Communications Act of 1934, 47 U.S.C. § 154(j), that the GTE Telephone Operating Companies are granted an extension of time until May 14, 1991, to make refunds of the $1.01 million in overcharges as required by the *March 28 Order*.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-192

In re Applications of

SYLVESTER COMMUNICATIONS LIMITED PARTNERSHIP (hereafter: SCLP) File No. BPH-880505ND

THOMAS W. LAWHORNE (hereafter: Lawhorne) File No. BPH-880505OA

CAM-BROADCASTING, INC. (hereafter: CAM) File No. BPH-880505OJ

For Construction Permit for a New FM Station on Channel 271A, Sylvester Georgia

HEARING DESIGNATION ORDER

Adopted: March 22, 1990 **Released: May 16, 1990**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. CAM petitioned for leave to amend its application on October 18, 1989. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

3. *Areas and Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That the petition for leave to amend filed by CAM IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-206

In re Applications of

SHENANDOAH BROADCASTING OF TEXAS, INC. (hereafter "Shenandoah")	File No. BPH-880428ME
MULTICOM BROADCASTING, INC. (hereafter "Multicom")	File No. BPH-880428MF
SAM HOUSTON NATIONAL BROADCASTING, INC. (hereafter "Houston")	File No. BPH-880428MG
SAN JACINTO COMMUNICATIONS COMPANY (hereafter "Jacinto")	File No. BPH-880428MJ
CLEVELAND BROADCASTING COMPANY (hereafter "CBC")	File No. BPH-880428MK
TEXAS CLASSICAL RADIO, INC. (hereafter "TCR")	File No. BPH-880428MM
SOUTHEAST TEXAS COMMUNICATIONS, INC. (hereafter "STC")	File No. BPH-880428MO
ADVENT BROADCASTERS, INC. (hereafter " Advent")	File No. BPH-880428MP
MCDUFFIE SERVICE CORPORATION (hereafter "McDuffie")	File No. BPH-880428MQ
GERALD J. LOFTON (hereafter "Lofton")	File No. BPH-880428MH (Dismissed Herein)
CLEVELAND ASSOCIATES (hereafter "Associates")	File NO. BPH-880428MS (Previously Dismissed)

For Construction Permit for a
New FM Station on Channel 246C1 (97.1 MHz) in
Cleveland, Texas

HEARING DESIGNATION ORDER

Adopted: March 30, 1990; Released: May 16, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters.* On January 2, 1990, Associates filed a petition for reconsideration and reinstatement of application *nunc pro tunc*. Associates requests reconsideration of the Commission's action of November 22, 1989, returning as unacceptable its application for a construction permit for a new FM station at Cleveland, Texas. On February 2, 1990, San Jacinto filed an opposition to the petition for reconsideration.

3. As orginally filed, Associates' proposal did not meet the requirements of Section 73.207(a) of the Commission's Rules (mininum separation requirements). On July 25, 1988, Associates timely amended its application to propose a fully-spaced site and to operate with 100 kW at 299 meters antenna height above average terrain (HAAT) (Section V-B, Items 7 and 9). However, the average of the eight radials specified in Item 19, Section V-B is 300.6 meters. With the HAAT calculated at 300.6 meters, the amendment violates Section 73.211(b) of the Rules. Consequently, the application as amended was returned as unacceptable for filing.

4. Associates states that the Commission based its action on a typographical error in one of the values listed in Item 19. It claims that the Commission should, however, have known that the particular value given for the height of radiation at 225' was an error because the correct data was specified in several other places in the application. Moreover, Associates points out that the site specified in its amendment was the same as that proposed by another applicant in the Cleveland proceeding and that, had the staff reviewed the Advent proposal, it should have recognized that the two applicants were utilizing the identical site and then realized that there was a typographical error in Associates' application. Finally, Associates asserts that the Commission ignored the fact that it maintains its own database for HAAT, of which it may and has taken official notice.

5. The fact that the correct HAAT was listed in several other places in the application does not mean that the staff could have confidently and reliably determined which figure was correct. To the processing staff, it was conceivable that Associates could have made an error when it calculated the HAAT, and then repeated the error, albeit consistently, throughout the application. The only conclusion the staff could make with respect to the HAAT was that one figure was accurate and one was incorrect. Consequently, we reject Associates' argument that the error was due to a "typo". Moreover, the burden

rests on an applicant to submit a complete and accurate application. We also reject the petitioners' assertion that the staff, had it reviewed the proposal of a competing applicant, should have recognized which figure was correct. Each application is judged solely on its own merits. Further, it would be unfair to an applicant whose submitted application was accurate, to use that data to assist in rendering another applicant's proposal viable.

6. "The Commission staff must process annually thousands of applications. It cannot be expected to do research for applicants or to probe the underlying engineering . . . If the Commission staff were required to assume such a burden, little or nothing would be accomplished." *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644 (D.C. Cir. 1968). Accordingly, for the foregoing reasons, Associates' petition for reconsideration will be denied.

7. On January 9, 1990, McDuffie, a competing applicant in this proceeding, filed a petition to deny Lofton's application.[1] The petitioner alleges that Lofton's application, as originally filed and amended, was inadvertently accepted for filing and, therefore, the application should be dismissed. McDuffie points out that the transmitter site in Lofton's original proposal was short-spaced to the KKHT-FM Houston, Texas, facility, yet there was no mention of the short-spacing, nor a request for a waiver of the Commission's minimum separation rule, provided in the original application. Consequently, McDuffie maintains that the application was fatally defective. Not until an amendment was filed on May 4, 1988, did Lofton acknowledge that his original site was short spaced to an existing facility. Moreover, McDuffie alleges that this May 4, 1988 amendment is also flawed, as it does not meet the Commission's tenderability requirements.

8. A Commission engineering study of Lofton's amendment reveals that the coordinates given in Section V-B, Question 2(b) of FCC Form 301 do not agree with those derived from the submitted USGS 7.5 minute map. The coordinates given in Section V-B, Question 2(b) are 30^0 36' 29" N.L. and 95^0 05' *41* " W.L., while those derived from the map are 30^0 36' 29" N.L. and 95^0 05' *38* " W.L. It is, therefore, impossible to determine from the face of the amendment whether the proposal is in compliance with the Commission's Rules.

9. The geographic coordinates, to the nearest second, of the proposed transmitter site are critical to processing the application. Thus, in the present case this inconsistent data makes it impossible to determine the veracity of the site availability certification, the environment impact statement, or the information supplied for FAA approval. In other cases, absence of these data makes its impossible to determine the distance from the proposed site to other proposed or existing broadcast facilities and to the community of license. In the commercial FM service, spacing determines acceptability of an application where mutual exclusivity exists with respect to a given allocation (*see* 47 C.F.R. § 73.207), and determines when mutual exclusivity exists between applicants for, or permittees of, different allocations. The geographic location also determines whether protection must be afforded to monitoring facilities and to radio quiet zones (*see* 47 C.F.R. § 73.315), and is fundamental to analysis of a proposal's environmental and electromagnetic effects on other, nearby communications facilities. Consequently, Lofton's amendment is defective and will be returned.

10. Moreover, an engineering study of Lofton's application as originally filed reveals that the proposal is in violation of 47 C.F.R. § 73.207. The proposal is 4.1 kilometers short-spaced to third adjacent Class C Station KNRJ(FM), Houston, Texas. The actual spacing between KNRJ(FM) and the Lofton proposal is 100.9 kilometers, while the required spacing, pursuant to Section 73.207, is 105 kilometers. A waiver of 47 C.F.R. § 73.207 was not requested. Accordingly, Lofton's application as originally filed will be dismissed as unacceptable for filing. Further, the petition to deny will be granted to the extent noted above and dismissed as moot in all other respects.

11. *CBC*. An applicant for a construction permit is required to certify that it is financially qualified to construct and operate its proposed facility for three months with revenue. CBC's response to Section III, FCC Form 301 (Financial Qualifications) indicates that it was unable to certify its financial qualifications at the time it filed its application. To date, no amendment has been received which indicates that the applicant is now able to certify that it is financially qualified. Accordingly, an appropriate issue will be specified.

12. CBC's January 18, 1990 amendment reports character issues added against a common principal, Raveesh Kumra, in CC Docket No. 89-610, in connection with an application for a new cellular system. CBC will be required to inform the presiding Administrative Law Judge in this proceeding regarding the outcome of CC Docket No. 89-610 as it relates to Raveesh Kumra.

13. *Multicom*. Multicom filed petitions for leave to amend its application on August 9, 1988 and September 1, 1989 and January 2, 1990, after the date for filing minor amendments as of right. The September 1, 1989 and January 2, 1990 amendments will be accepted for Section 1.65 purposes only. Consequently, no comparative advantage will accrue. The new antenna site proposed in Multicom's August 9, 1988 amendment was filed for purposes of obviating the need for a waiver of Section 73.3555 of the Commission's Rules. Multicom has not demonstrated that good cause exists for accepting the amendment. Accordingly, the petition for leave to amend will be denied and the amendment will be returned. However, it should be noted that due to changes to 47 C.F.R. § 73.3555, Multicom's original proposal complies with the requisite Commission Rules. *See, First Report and Order* in Docket 87-7, 4 FCC Rcd 1723 (1989).

14. Multicom proposes to sidemount its antenna on the existing K66CA-TV broadcast tower one mile south of Livingston, Texas. According to the Commission's data base, the accepted coordinates for this tower are 30^0 41' 38" N.L., 94^0 56' *12* " W.L. Examination of the application submitted by the applicant reveals a slight discrepancy between the coordinates given and the coordinates listed above. Preliminary analysis shows the following coordinates pursuant to the applicant's application:

30^0 41' 38" N.L.

94^0 56' *14* " W.L.

Because the applicant clearly proposes to locate on an existing tower licensed to other Commission licensees, and because specific reference is made to this tower in various places in the application in question, the Commission could, "drawing the application as a whole", confidently verify the transmitter location in the defective

application by taking official notice of the site coordinates found in the Commission's files for the licensed colocated facilities. Accordingly, this application is found to be acceptable for filing; however, the applicant is required to clarify the discrepancy and file a corrected transmitter site map within 30 days of the release of the Order.

15. *Jacinto.* Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Jacinto has not completed Item 4 correctly. Jacinto's application gives a post office box number as the residence address for Meta G. and Nydia D. Thomas. Accordingly, Jacinto must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

16. CBC petitioned for leave to amend its application on June 6, December 13, 1989 and January 18, 1990. TCR petitioned for leave to amend its application on January 25, 1989, and May 24, 1989 and January 31, 1990. The accompanying amendments were filed after July 27, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

17. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

18. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

19. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to CBC, whether the applicant is financially qualified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

20. IT IS FURTHER ORDERED, That Associates' petition for reconsideration IS HEREBY DENIED.

21. IT IS FURTHER ORDERED, That Lofton's May 4, 1988 amendment IS HEREBY RETURNED and Lofton's application, as originally filed, IS HEREBY DISMISSED.

22. IT IS FURTHER ORDERED, That McDuffie's petition to deny IS GRANTED to the extent noted within and IS DISMISSED as moot in all other respects.

23. IT IS FURTHER ORDERED, That CBC shall inform the presiding Administrative Law Judge in this proceeding regarding the outcome of CC Docket No. 89-610 as it relates to Raveesh K. Kumra.

24. IT IS FURTHER ORDERED, That Multicom's September 1, 1989, and January 2, 1990 Petitions for leave to amend ARE GRANTED, and the corresponding amendments ARE ACCEPTED; however, Multicom's August 9, 1988 petition for leave to amend IS DENIED and the corresponding amendment IS RETURNED.

25. IT IS FURTHER ORDERED, That Jacinto shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

26. IT IS FURTHER ORDERED, That Multicom shall submit an amendment to the presiding Administrative Law Judge clarifying the coordinate discrepancy described in paragraph 14, above, within 30 days of the release of this Order.

27. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by CBC and TCR ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] On January 16, 1990, Jacinto, also an applicant in this proceeding, filed comments in support of the petition to deny.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-224

In re Applications of

Marked Tree Media Partnership (hereafter "Media") — File No. BPH-880518ML

George S. Flinn, Jr. (hereafter "Flinn") — File No. BPH-880519NU

For Construction Permit for a New FM Station on Channel 229A in Marked Tree, Arkansas

HEARING DESIGNATION ORDER

Adopted: April 13, 1990; Released: May 16, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Flinn.* Applicant proposes to sidemount its antenna on the existing KPCA(AM) tower. Our engineering study indicates that this proposal may significantiy exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Flinn may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Flinn's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must include the effects of colocation with KPCA. In this regard, if the site is presently fenced in compliance with the guidelines, Flinn is required to so state and give the distance from the base of the tower to the fence. Accordingly, Flinn will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

3. *Other matters.* Flinn petitioned for leave to amend his application on October 6, 1988, February 3, 1989, March 1, 1989, August 28, 1989, and February 12, 1990. The accompanying amendments were filed after September 8, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Flinn would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Flinn in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the Flinn would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That in accordance with paragraph 2 hereinabove, Flinn shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Flinn ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-223

In re Applications of

PATRICK M. McCABE (Hereafter "McCabe")	File No. BPH-880826MH
RADIO RESEARCH DEVELOPMENT, INC. (Hereafter "Radio")	File No. BPH-880913MB
HICKS BROADCASTING CORPORATION (Hereafter "Hicks")	File No. BPH-880914ML
MARGARET LANNANNEA LEHNER (Hereafter "Lehner")	File No. BPH-880914MN

For Construction Permit for a new FM Station on Channel 255 in Paynesville, Minnesota

HEARING DESIGNATION ORDER

Adopted: April 13, 1990; Released: May 16, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Hicks.* An engineering review of Hicks' application reveals that the 60 and 70 dBu contours, as plotted in Exhibit E-3 - the contour map, do not correspond to the distances listed in Exhibit E-4 - the table detailing the predicted contour calculations. By using the distance scale provided in Exhibit E-3, it was determined that the radial distances to the 60 and 70 dBu contours were plotted up to 31 percent shorter than the corresponding values found in Exhibit E-4. Although this discrepancy does not violate any Commission rule, it does make it impossible to accurately determine the actual coverage of Hicks' proposed facilities. Accordingly, Hicks will be required to file an amended contour map, which also indicates the precise location of its transmitter, with the presiding Administrative Law Judge within 30 days of the date of this Order.

3. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Hicks have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Hicks would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

4. *Other Matters.* Lehner petitioned for leave to amend her application on January 31, 1989. The accompanying amendment was filed after January 20, 1989, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Hicks would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That Hicks provide to the presiding Administrative Law Judge within 30 days of this Order, the amendment specified in paragraph 2, above.

9. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Lehner IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by

attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Interconnection of Exchange Access Carrier Facilities	RM 7249

ORDER

Adopted: May 9, 1990; Released: May 11, 1990

By the Chief, Common Carrier Bureau:

1. On April 30, 1990, Metropolitan Fiber Systems, Inc. (MFS) filed a Motion for Extension of Time, asking the Commission to extend the date for filing reply comments in this proceeding from May 14, 1990 to May 29, 1990.[1] MFS states that additional time is necessary for the preparation of reply comments due to the voluminous record and the complexity of the issues raised by parties opposing the Petition for Rule Making. MFS adds that considerable research and analysis is required in order to fully address the issues involved, and states that it is seeking further documentation in response to certain contentions raised in the initial comments. In addition, MFS states that its Board of Directors recently elected a new president and chief executive officer who wishes to review the issues in this proceeding and personally participate in the formulation of the reply comments. MFS concludes by stating that grant of its request would serve the public interest by ensuring that the Commission has a more complete and accurate record on which to base its decision.

2. There is no denying the complexity of the issues raised and, therefore, the benefits to be gained through the development of a full and complete record in this proceeding. While we do not routinely grant extensions of time, we believe that good cause exists for the limited extension requested.[2] We note that MFS, which is requesting the additional time to file reply comments, also filed the Petition initiating this proceeding and that no party, including those supporting the Petition, opposes this Motion. Given all the existing circumstances, we grant the extension requested in order to further the public interest.

3. Accordingly, IT IS ORDERED, that MFS's motion for extension of time to file reply comments IS GRANTED, and that reply comments in this proceeding ARE TO BE FILED by May 29, 1990. [3]

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Motion for Extension of Time to File Reply Comments, filed by Metropolitan Fiber Systems, Inc. on April 30, 1990. We established May 14, 1990, as the filing date for reply comments in FCC Public Notice, DA 90-132 "Pleading Cycle Established on Metropolitan Fiber Systems' Petition on Interconnection of Competitive Carrier Access Facilities," released February 2, 1990.

[2] Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a).

[3] This action is taken pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Communication's Rules, 47 C.F.R. §§ 0.91 and 0.291.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-207

In re Applications of

RADIO REPRESENTATIVES, INC. (hereafter "Representatives")	File No. BPH-880620MB
RODOLFO & ASSOCIATES, INC. (hereafter "Rodolfo")	File No. BPH-880622MK
TRAPPER/COLE RADIO, INC. (hereafter "Trapper")	File No. BPH-880623ML
CABALLERO SPANISH MEDIA INC. (hereafter "Caballero")	File No. BPH-880623MM
NELSON BROADCASTING LIMITED PARTNERSHIP (hereafter "Nelson")	File No. BPH-880623MN
IRENE ESCALANTE (hereafter "Escalante")	File No. BPH-880623MO

For Construction Permit
for a New FM Station in
Orcutt, California on
Channel 239B1 (95.7 MHz)

HEARING DESIGNATION ORDER

Adopted: March 30, 1990; Released: May 16, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Caballero*. Caballero submitted an engineering amendment to its application on October 5, 1988, specifying a new transmitter site and proposing operation with 7.7 kW effective radiated power ("ERP"). Staff review of that amendment reveals that the HAAT as determined from the average of the eight radials in Section V-B, Item 19, is 284.6 meters. This figure conflicts with the 183 meter HAAT in Section V-B, Item 7. For a Class B1 station operating with a 284.6 meter HAAT the maximum permissible ERP is only 3.1 kW, not 7.7 kW. Thus, the proposed operation from the amendment would violate the maximum ERP/HAAT limits set forth in 47 C.F.R. § 73.211(b). Given the information in the application, the staff is unable to ascertain which HAAT is correct. Accordingly, the October 5, 1988 amendment is unacceptable for filing and will be returned.

3. The return of the October 5, 1988 amendment necessitates consideration of Caballero's application as originally submitted. The original application, however, lacks page 14 which, in part, lists antenna and tower height data. Since the requested data is present elsewhere in the application, (*e.g.*, on the tower sketch), this omission does not render the application unacceptable for tender. Caballero will be required, however, to amend its application to supply the missing page 14 information.

4. *Trapper, Caballero, Escalante, Representatives*. Each of these applicants proposes to locate its antenna on the existing tower of Station KRQK-FM, Lompoc, California. The KRQK facility is licensed at coordinates 34^0 44' *24* " North Latitude, 120^0 26' *42* " West Longitude with an overall tower height above ground level of 40 meters. Station KRQK also holds a construction permit, BPH-880822ID, (granted January 5, 1989) for a new 40 meter tower (including obstruction lighting) at the same coordinates. Discrepancies exist among the data supplied by these applicants in regard to their applications and to the permitted station KRQK facilities as follows:

APPLICANT	COORDINATES	HEIGHT
Trapper, Caballero	34^0 44' *29* " NL, 120^0 26' *45* " WL	46 meters
Escalante	34^0 44' *30*' NL, 120^0 26' *45* " WL	56 meters[1]
Representatives	34^0 44' *30* " NL, 120^0 26' *45* " WL	60 meters[2]

Inasmuch as these applicants reference an existing licensed broadcast tower, official notice may be taken of data in the Commission's files. *See PN Radio Company*, 2 FCC Rcd 5540, 5543 (M.M. Bur. 1987). Pursuant to such official notice, the staff can verify that each applicant proposes to locate on the same structure and at the same site. Consequently, the discrepancies do not rise to the level of tenderability or acceptability defects. Nevertheless, Trapper, Escalante, and Representative shall each submit a clarifying amendment to the presiding Administrative Law Judge within 30 days of the release of this Order. In addition, an air hazard issue will be specified below as to these three applicants. Further, the applicants shall notify Station KRQK-FM of the discrepancy in order that the licensee may correct data on file with the Commission, if necessary.

5. *Escalante*. In response to Section III, FCC Form 301, Escalante indicated that she was not financially qualified to construct and operate the requested facilities for three months without revenue. On October 13, 1988, Escalante filed an untimely amendment certifying that she is now financially qualified. However, in the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936 (May 13, 1985), the Commission adopted strict rules governing acceptance of amendments to FM applications. These rules provide that amendments which address the acceptability or grantability of an application may be filed as a matter of right any time prior to the expiration of the 30 day period triggered by release of the Public Notice announc-

ing that the application has been accepted for tender. 50 Fed. Reg. at 19.941. *See also* 47 C.F.R. § 73.3522(a)(6). A party may not, however, perfect its application by correcting an acceptability or grantability defect after the time for filing amendments as of right has passed. Accordingly, Escalante's October 13, 1988 amendment, as it relates to the applicant's financial status, will be returned as untimely, and a financial qualifications issue will be specified below.

6. *Rodolfo*. Information before the Commission indicates that Rodolfo was organized by and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Rodolfo's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Rodolfo in this proceeding.

7. An analysis by the Commission's staff has revealed that Caballero's proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Caballero may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Caballero's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. In this regard, if the site is presently fenced in compliance with the guidelines, Caballero is required to so state and give the distance from the base of the tower to the fence. Accordingly, Caballero will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

8. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last dates for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS
Trapper	March 30, 1989
Rodolfo	November 21, 1988; May 9, 1989; June 16, 1989; August 15, 1989

9. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Escalante, whether the applicant is financially qualified.

2. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Representatives, Caballero, Trapper, and Escalante would constitute a hazard to air navigation.

3. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Rodolfo.

4. To determine whether Rodolfo's organizational structure is a sham.

5. To determine, from the evidence adduced pursuant to Issues 3 through 4 above, whether Rodolfo possesses the basic qualifications to be a licensee of the facilities sought herein.

6. If a final environmental impact statement is issued with respect to Caballero in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That the October 5, 1988 amendment submitted by Caballero IS HEREBY RETURNED.

13. IT IS FURTHER ORDERED, That Caballero shall submit the amendment specified in paragraph 3 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That the October 13, 1988 amendment filed by Escalante IS HEREBY RETURNED.

15. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Trapper, Escalante, and Representatives shall submit the clarifying amendments specified in paragraph 4 hereinabove to the presiding Administrative Law Judge and, if appropriate, notify Station KRQK-FM, Lompoc, California, of discrepancies between the coordinates of their proposed facilities and the coordinates for KRQK-FM on file with the Commission.

16. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

17. IT IS FURTHER ORDERED, That in accordance with paragraph 7 hereinabove, Caballero shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Trapper and Rodolfo ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

19. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

21. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] We note that the applicant proposes to increase the height of an existing tower.

[2] These coordinates were changed per timely filed amendment dated October 4, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 90-119

In the Matter of

Florida Region Public
Safety Plan

ORDER

Adopted: May 10, 1990; Released: May 16, 1990

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On November 27, 1989, the Florida Area (Region 9) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in its region. On February 26, 1990, Region 9 filed revisions to the plan, based on conversations with the Commission's staff.

2. The Region 9 plan was placed on Public Notice for comments on March 14, 1990, 55 FR 9357 (Mar. 13, 1990). The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Region 9 and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Florida.

4. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Region 9 IS ACCEPTED. Furthermore, licensing of the 821-824/866-869 MHz band in Region 9 may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

King Broadcasting Company
San Leandro, California

File No. 758276
90044

For waiver of Sections 94.9(b)(2)(i) and 94.71 of the Rules

WAIVER

Adopted: May 9, 1990; Released: May 16, 1990

By the Chief, Land Mobile and Microwave Division:

1. King Broadcasting Company (King) seeks a waiver of 47 C.F.R. §§ 94.9(b)(2)(i) and 94.71, to permit the use of a 12 GHz Private Operational Fixed Microwave Service (OFS) frequency with an emission bandwidth of 34.8 MHz to serve as the final link in the chain of distribution of program material to a broadcast station. Section 94.9(b)(2)(i) states that OFS facilities may be used to transmit program material from one location to another, provided that the operational-fixed frequencies[1] do not serve as the final link in the chain of distribution of the program material to broadcast stations. Section 94.71 limits its emission bandwidth in the OFS 12 GHz band to 20 MHz.

2. King wishes to relay several FM broadcast signals[2] from a receive point in San Leandro, California to co-channel FM high power boosters located on Mt. Diablo via a single wideband microwave link. The boosters provide the FM stations with a means of serving an extensive population in the East Bay region of the San Francisco-Oakland, California metropolitan area blocked by terrain. King states that combining the FM signals on a single wideband link will allow it to deliver an exact replica of each station's original modulated carrier signal to the booster. An exact replica is beneficial because less mutual interference will be created than when the booster only synchronizes carrier frequencies.

3. King pleads that there is no viable alternative to deliver the FM signals to the boosters. Spectrum in the 950 MHz aural broadcast auxiliary band is extremely congested in the San Francisco area and it is very unlikely that with the number of boosters proposed that sufficient channels would be available. King states that other higher frequency bands in the OFS and auxiliary broadcast service were considered, but are unacceptable due to the path length involved. [3]

4. King argues that few new requests have been made for authorizations in the OFS 12 GHz band since its reallocation and conversion to secondary status to the Direct Broadcast Satellite Service (DBS).[4] It pleads that there has, in fact, been a general migration from 12 GHz to other OFS frequencies. Consequently, King states that its proposed system will promote fuller use of currently underutilized spectrum and will not exacerbate OFS frequency congestion problems in the proposed area.

5. Pursuant to Section 1.3 of its Rules, 47 C.F.R. § 1.3 the Commission may waive any provision of its rules if it determines that good cause has been shown and that a grant of the waiver would not undermine the policies embodied in the rule. *See Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). We find that unique circumstances are involved in this case that justify the grant of the waiver. The use of 12 GHz frequencies has continuously declined since the reallocation of the band to the DBS[5] and currently represents only 2.6 percent of the total OFS paths authorized. Most applicants typically reject its use because of its uncertain future. King acknowledges and accepts the secondary status and its interference protection requirements. King's request will, therefore, have little effect on frequency availability in the area. Additionally, there are no primary 12 GHz DBS operations contemplated in this area in the near future. Under these very limited circumstances, we find the operation proposed to be in the public interest.

6. Accordingly, pursuant to Sections 0.331 and 1.3 of the Rules, King's request for waiver of Sections 94.9(b)(2)(i) and 94.71 associated with the above application IS GRANTED for an indefinite term on a secondary non-interference basis to DBS systems.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile & Microwave Division

FOOTNOTES

[1] Section 94.9(b)(2)(iii) excludes frequencies above 21,000 MHz and channels in the 6425-6525 MHz band.

[2] Stations KYA, KSAN-FM, KFOG, and KSOL with another 4 to 6 possible in the near future.

[3] The proposed path is 15.4 miles and would require multiple hops, employing either several 23 GHz frequencies or a combination of 23 GHz and a lower OFS frequency. Such a configuration would, overall, require more spectrum, inconsistent with the intent of Section 94.9(b)(2)(i).

[4] *See Report and Order*, FCC 82-285, released July 21, 1982.

[5] In the last four years, the number of 12 GHz OFS links has decreased by approximately 30%.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

Oklahoma State Regents for Higher Education Lawton, Snyder, and Altus, Oklahoma

Case No. 90047

For waiver of Section 95.9(b)(2)(i) of the Commission's Rules

WAIVER

Adopted: May 11, 1990; Released: May 16, 1990

By the Chief, Land Mobile and Microwave Division:

1. The Oklahoma State Regents for Higher Education (Oklahoma) seek a waiver of Section 94.9(b)(2)(i) of the Commission's Rules, 47 C.F.R. § 94.9(b)(2)(i), to permit the use of a 6 GHz Private Operational Fixed Microwave Service (OFS) frequency to serve as the final link in the chain of distribution of program material to a broadcast station. Section 94.9(b)(2)(i) states that OFS facilities may be used to transmit program material from one location to another, provided that the operational-fixed frequencies do not serve as the final link in the chain of distribution of the program material to broadcast stations.

2. Oklahoma wishes to lease excess capacity on three currently constructed and operational OFS links[1] to Cameron University[2] for the transmission of stereo educational programing material to a proposed Class C2 noncommercial FM radio station. This new radio translator station in Altus, Oklahoma, will provide cultural and educational services that are not currently available from any other source. Oklahoma pleads that with its OFS system currently in place it would be unreasonable and a waste of resources and spectrum to require Cameron University to construct a redundant system. The requested circuits would use less than one percent of the available channel capacity, which to date is loaded to approximately ten percent. Oklahoma believes that this request is consistent with Commission policy of encouraging shared usage of valuable frequency spectrum.

3. The Commission may waive any provision of its Rules if good cause is shown and a grant of the waiver would not undermine the intent of the rule. *See Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). Section 94.9(b)(2)(i) is designed to ensure spectrum availability for private communications. Oklahoma is not seeking additional spectrum in connection with this waiver request. It has also certified that its system has sufficient capacity for its own current and future requirements as well as those of Cameron University. Oklahoma's request will, therefore, have no effect on OFS frequency availability in the area and will conserve public funds. Under these very limited circumstances, we find the operation proposed to be in the public interest.

4. Accordingly, pursuant to Sections 0.331 and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.3, Oklahoma's request for waiver of Section 94.9(b)(2)(i) associated with the referenced frequency paths IS GRANTED for an indefinite term.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division

FOOTNOTES

[1] The OFS stations are WNES-259, WIQ-43, WIQ-42 and WNES-258, with approximately 70 miles of microwave.

[2] Cameron University is part of the Oklahoma Higher Education System under the coordination authority of the Oklahoma State Regents for Higher Education.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-234

In re Applications of

REV. J. BAZZEL AND ELIZABETH MULL d/b/a SEYMOUR COMMUNICATIONS (hereafter "Seymour") File No. BPH-870619MB

CARMEL COMMUNICATIONS LIMITED PARTNERSHIP (hereafter "Carmel") File No. BPH-870625MJ

For Construction Permit for
New FM Station, Channel 242A, 96.3 MHz
Seymour, Tennessee

HEARING DESIGNATION ORDER

Adopted: April 13, 1990; Released: May 17, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Carmel.* Information before the Commission indicates that Carmel was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Carmel's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Carmel in this proceeding.

3. Carmel has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area, pursuant to Section IV, Form 301. Accordingly, Carmel will be required to file within 30 days of the release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

4. Carmel's application indicates that its proposal, which is based on the provisions of 47 C.F.R. § 73.313, will cover only 68.3% of the area within the legal boundaries of Seymour, Tennessee. The applicant has, therefore, requested a waiver of 47 C.F.R. § 73.315(a). The applicant states that substantial compliance (80%) is not achievable due to a large ridge on the 180-degree radial, between 3 and 16 km, which must be included pursuant to 47 C.F.R. § 73.313. (We note that the actual height above average terrain has been computed properly.)

5. A supplemental showing to support the waiver request has been provided. This showing uses a truncated 180-degree radial to show the expected coverage, which will encompass 82.2% of the community of license. This radial, extending from 3 km to 10.5 km (the edge of the community in that direction) is used to show that the 70 dBu contour will actually extend further in that direction than is normally predicted under 47 C.F.R. § 73.313. The applicant concedes that coverage beyond the ridge will be significantly attenuated; however, the city of Seymour does not extend beyond the ridge in that direction. Consequently, we find that the proposal will place a field strength of 70 dBu or greater up to the ridge. Carmel's supplemental showing for city coverage is accepted, and the application is found to be in substantial compliance with the city coverage provisions of 47 C.F.R. § 73.315. Accordingly, its request for waiver of this section will be dismissed as moot.

6. *Other Matters.* Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR

HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Carmel.

2. To determine whether Carmel's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2, above, whether Carmel possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine which of the proposals would, on a comparative basis, better serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if either.

9. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the Carmel shall file an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area.

10. IT IS FURTHER ORDERED, That the request for waiver of 47 C.F.R. § 73.315 of Carmel IS DISMISSED AS MOOT.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] An application by Great Smoky Mountains Broadcasting, Inc. ("Great Smoky") was filed on June 25, 1987 (BPH-870625MK). On August 29, 1988, the Chief, FM Branch, dismissed Great Smoky's application in accordance with a July 11, 1988 Settlement Agreement between Great Smoky and Carmel. Seymour's application, as originally filed, had been returned by the Chief, FM Branch on May 3, 1988 as inadvertently accepted for tender since the legal boundaries of the community of license were not clearly and legibly defined on the contour map. On August 29, 1988, the Chief, Audio Services Division, denied Seymour's petition for reconsideration of the action by the Chief, FM Branch. Accordingly, in approving the settlement agreement between Carmel and Great Smoky, the Chief, FM Branch also granted a construction permit to Carmel. On September 29, 1988, Seymour filed a petition for reconsideration of the grant of Carmel's application. On October 11, 1989, the Chief, Audio Services Division granted Seymour's petition, rescinded the grant of Carmel's application and reinstated Seymour's application.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-225

In re Applications of

CARTERVILLE BROADCASTING, INC. (hereafter "CBI")	File No. BPH-880420MD
MARILYN PRANNO (hereafter "Pranno")	File No. BPH-880421MA
MEEKS BROADCASTING COMPANY (hereafter "Meeks")	File No. BPH-880421NC
Rebekah L. and Lerry R. Roethe d/b/a R & R COMMUNICATIONS (hereafter "R & R")	File No. BPH-880421NX

For Construction Permit for a
New FM Station on Channel 236A
(95.1 MHz) in Carterville, Illinois

HEARING DESIGNATION ORDER

Adopted: April 13, 1990; Released: May 17, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Pranno*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Pranno filed such a statement, it failed to specify any readily-identifiable minority organization it proposes to utilize for recruitment purposes. Pranno will therefore be required to amend this portion of its EEO statement.

3. *Other matters*. R & R petitioned for leave to amend its application on April 28, 1989, after July 27, 1988, the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That Pranno shall submit Section VI information in accordance with paragraph 2 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. IT IS FURTHER ORDERED, That the petition for leave to amend filed by R & R IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Fleet Call, Inc. File No. LMK-90036

ORDER

Adopted: May 9, 1990; Released: May 10, 1990

By the Chief, Land Mobile and Microwave Division, Private Radio Bureau:

1. On April 12, 1990, the Commission adopted a Public Notice in the above captioned matter. The specified deadlines for comments and reply comments were 30 days from the date of notice and 15 days from the last day of the comment period respectively.

2. On April 27, 1990, the National Association of Business and Educational Radio, Inc. (NABER) filed a motion requesting a 60 day extension of the comment period and a 15 day extension of the reply period. NABER cites the complexity of the Fleet Call proposal and its potential effect upon existing licensees as grounds for its request. NABER also expresses a desire to discuss the proposal with its members at its Annual Meeting from May 9 to May 12, 1990 and to include their views in its comments to us. Advanced Mobilecomm, Inc., Millicom Radio Telephone Company, Inc. and United Mobile Networks, Inc. have filled comments in support of NABER's request.

3. On May 7, 1990, Motorola Inc. also requested a 60 day extension of time. Motorola also cites the complexity of the Fleet Call proposal and its potential impact upon existing licensees and upon their ability to develop and implement innovative technology of their own. In addition, Motorola complains of Fleet Call's failure to provide all information necessary for full evaluation of its proposal. Most significantly, Motorola points to the absence of specific system design maps for four of the six markets included in Fleet Call's request and the absence of specific channel assignments for all six markets. As submitted, the Fleet Call proposal contains only maps for the Los Angeles and San Francisco areas.

4. We recognize the importance of developing a complete record in this proceeding, and have provided a thirty day comment period to develop such a record. NABER, Motorola and all commenting parties believe that more time is needed, particularly in view of the potential impact upon existing licensees. For this reason, we find that good cause exists for an extension of time and will extend the due date of all comments by 30 days and the due date of all reply comments by 15 days. We believe that this additional amount of time is sufficient for all parties to evaluate and comment upon Fleet Call's proposal. To the extent that the petitioning parties consider Fleet Call's waiver request to be incomplete, they may raise this matter in their comments.

5. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 0.331 of the Commission's Rules and Regulations, that all interested parties will have until June 13, 1990 to file comments and until July 13, 1990 to file reply comments.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and
Microwave Division
Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-120

In re Applications of

Kenneth R. Carberry, *et al.*
d/b/a NORTHAMPTON MEDIA ASSOCIATES
Northampton, Massachusetts — File No. BPH-831216AJ

CUTTER BROADCASTING, INC.
Northampton, Massachusetts — File No. BPH-840518IB

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: April 30, 1990; Released: May 17, 1990

By the Commission:

1. In our underlying decision in this case, we upheld the Board's conclusion that Cutter was the clear comparative winner. *Northampton Media Associates*, 4 FCC Rcd 5517 (1989). Before us now are petitions for reconsideration and related pleadings.[1] For the reasons that follow, we deny reconsideration.

2. Our decision upheld the result reached by the Review Board, but we modified the Board's analysis of the financial certification and financial qualification issues pending against Cutter. The Board found Cutter financially qualified despite its failure to provide contemporaneous documentation of its financing at the time of certification as required by *Las Americas Communications Inc.*, 1 FCC Rcd 786 (Review Board 1986). The Board noted that an applicant will not be disqualified for such a technical violation, if the applicant has demonstrated in the hearing -- via other reasonable and reliable evidence -- that funds were available for constructing and operating its station at the time of its financial certification, citing *Armando Garcia*, 3 FCC Rcd 1065 (Rev. Bd. 1988), review denied, 3 Rcd 4767 (1989). Finding that Cutter had made such an evidentiary showing in this case, the Board rejected NMA's contention that Cutter should be disqualified for such a technical violation. *Id.* at 5167 ¶ 8.[2]

3. On review, we found that the contemporaneous documentation rule of *Las Americas* was inconsistent with *Revision of Form 301*, 50 RR 2d 381, 382 ¶ 6 (1981), in which we promulgated the financial certification procedure. We held there that documentation supporting the attestation of financial qualification need not be submitted with an application but must be available to the Commission upon request. Based on our analysis of that holding, we concluded herein that an applicant does not necessarily have to have written documentation when it certifies its financial qualifications. Rather, an applicant may prepare and submit supporting documentation after certification, provided that the applicant actually had reasonable assurance of adequate funds at the time of certification. 4 FCC Rcd at 5518-19 ¶ 14.

4. In its instant petition for reconsideration, NMA continues to argue that Cutter should be disqualified for not being financially qualified when it filed its application, for falsely certifying its financial qualifications, and for not having written documentation of its finances at the time of certification. We will deny NMA's petition. As it has done throughout this proceeding, NMA's first two contentions do no more than challenge the evidentiary analysis adopted at all levels of review in this case. It is well established that the Commission does not grant reconsideration to permit reargument of matters that it has already considered and addressed. *WWIZ, Inc.*, 37 FCC 685 (1964), aff'd sub nom. *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C.Cir. 1965), cert. denied, 383 U.S. 967 (1965).

5. NMA's contentions concerning the certification procedure are equally unpersuasive. Essentially it contends that our interpretation of the requirements of the certification procedure is premised on an incorrect reading of the 1981 financial certification procedure, that it contravenes Section 308 of the Communications Act, and that it tacitly and unlawfully reverses the burden of proof imposed on an applicant to establish its own financial qualifications. NMA's latter two objections to our analysis of the certification procedure merely reflect a disagreement about the nature of the showing the Commission should require of an applicant pursuant to Section 308 of the Act to establish that it had reasonable assurance of the necessary financing at the time of certification. Our construction of the certification procedure neither relieves applicants of their burden of proving their financial qualifications, if called on to do so, nor otherwise contravenes Section 308. As set out above, Cutter has amply demonstrated its compliance with our requirements on this record. In addition, we have already considered and rejected the interpretation of the certification procedure NMA would have us adopt in our previous decision. As mentioned, the Commission does not grant reconsideration to permit reargument of matters that it has fully considered and addressed. Thus, NMA's contentions concerning the propriety of our analysis of the requirements of the certification procedure are without merit.

6. The Mass Media Bureau has also filed a petition for reconsideration of that aspect of our decision which held that the certification procedure does not require applicants to have contemporaneous written documentation to support their financial plans when certifying their financial qualifications. In its petition, the Bureau urges us to modify that holding so as to limit its application to applicants, such as Cutter, who rely solely on the personal resources of their principals. All other applicants, the Bureau submits, should be required to have contemporaneous written documentation to support their financial plans when certifying their financial qualifications.

7. Although the Bureau contends that the public interest would be best served by granting reconsideration, it has provided no basis for the disparate treatment of applicants that it proposes and we find none ourselves. Nor does the Bureau show why the evidentiary submissions demonstrating that the applicant was financially qualified

at the time its application was filed, as specified by our decision herein, are insufficient to meet the requirements of the certification procedure. More importantly, given the previous clear indications that an applicant need not prepare the documentation contemplated by the certification procedure requirements until requested to do so, 4 FCC Rcd at 5518 ¶ 14, we believe that there is no valid basis for such an approach. In view of the foregoing, we will deny the Bureau's petition. [3]

8. ACCORDINGLY, IT IS ORDERED, That the Petitions for Reconsideration filed August 14, 1989 by Northampton Media Associates and by the Mass Media Bureau ARE DENIED.

9. IT IS FURTHER ORDERED, That the Motion to Strike filed August 21, 1989 by Cutter Broadcasting Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Commission has before it: (a) a Petition for Reconsideration filed August 14, 1989 by Northampton Media Associates (NMA); (b) a Petition for Reconsideration filed August 14, 1989 by the Mass Media Bureau (Bureau); (c) a Response to the Bureau's Petition for Reconsideration filed August 28, 1989 by NMA; (d) an Opposition to NMA's Petition for Reconsideration filed August 29, 1989 by Cutter Broadcasting, Inc. (Cutter); (e) an Opposition to the Bureau's Petition for Reconsideration filed August 28, 1989 by Cutter; (f) a Reply to Cutter's Opposition filed September 9, 1989 by NMA; (g) a Motion to Strike the Petitions for Reconsideration filed August 21, 1989 by Cutter; and (h) Oppositions thereto filed August 28 and 30, 1989 by NMA and the Bureau, respectively. Cutter's motion to strike is an unauthorized pleading. Parties objecting to petitions for reconsideration have ample opportunity to do so in opposition pleadings, which are authorized under Section 1.106 of the Commission's Rules governing petitions for reconsideration. 47 C.F.R. § 1.106.

[2] In our decision in this case, we agreed with the Board that Cutter was financially qualified at the time of financial certification. 4 FCC 5517-5518 ¶¶ 5-8. There, we concluded that the Cutter principals, prior to certification, had engaged in serious and reasonable efforts in determining that $38,836 would be needed to construct and operate the station for three months without revenues, and had reasonable assurance of the availability of financing inasmuch as it had been demonstrated in hearing, by substantial and reliable evidence, that Cutter's principals, who were to provide the funds relied on for meeting those estimated construction and operating costs, had net liquid assets of $70,000 and a net worth of more than $615,000, which were more than adequate to cover the estimated costs.

[3] The holdings herein should not be construed as negating our concerns regarding the need for all applicants subject to the recent revisions of FCC Form 301 to have information and documentation of their financial qualifications on hand at the time of certification. *Revision of Application for Construction Permit for Commercial Broadcast Station*, 4 FCC Rcd 3853, 3859 ¶ 43 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

AIRCALL COMMUNICATIONS, INC. Reference No. 63500-87-75-RPS

Notice of Apparent Liability for Forfeiture for Station KRM965 in the Public Land Mobile Radio Service operating on frequency 158.70 MHz near Springfield, Illinois

MEMORANDUM OPINION AND ORDER

Adopted: May 10, 1990; Released: May 17, 1990

By the Chief, Mobile Services Division:

1. Aircall Communications, Inc. (Aircall) has filed a request for remission of the amount of a $3,650 forfeiture assessed by the Mobile Services Division (MSD) in a Notice of Apparent Liability for Forfeiture (NALF) dated June 2, 1987. No responsive pleadings have been filed.

I. BACKGROUND AND CONTENTIONS

2. Aircall was granted a construction permit for a base station facility at Station KRM965 on October 12, 1983. The permit stated that the expiration date was October 12, 1984. Aircall states that it completed construction on January 21, 1984, within the terms of the construction permit, and that it immediately began commercial operations without having filed an application for a license to cover the construction permit.[1] Aircall states that it did not discover its failure to file an application for a license to cover its construction permit until shortly before January 21, 1987, the date on which Aircall filed a "Notification of Status of Facilities" on FCC Form 489. In addition, Aircall filed a request for Special Temporary Authority on March 25, 1987, requesting authority to continue operation of its facilities pending processing of the FCC Form 489. On June 2, 1987, the Mobile Services Division issued the captioned NALF, assesssing a forfeiture of ten dollars ($10) per day (a total of $3,650) for the year prior to receiving Aircall's late-filed Form 489 on January 21, 1987.

3. Aircall argues that forfeitures are remedial, not punitive, sanctions designed to deter non-compliance with the law. Aircall argues that the Commission is required to consider the nature, circumstances, extent and gravity of the violation. With regard to the violator, argues Aircall, the Commission is required to consider the degree of culpability, history of prior offenses, ability to pay, and other matters required by justice. Aircall argues that under these standards, it should not be assessed a forfeiture because it brought the violation to the Commission's attention itself, the violation was inadvertent, it has corrected the situation, it has no history of previous offenses, and the Commission should encourage voluntary reporting of such inadvertent offenses by not assessing a forfeiture.

4. In addition, Aircall argues that there is a one-year statute of limitations on assessment of a penalty, which dates backward in time one year from the date the NALF is issued (in this case, June 2, 1987). Thus, argues Aircall, since the violation ended on January 21, 1987, it is only liable for the period of time between June 2, 1986 and January 2, 1987, or 233 calendar days.[2]

5. In addition, Aircall cites other cases wherein the assessed forfeiture was about the same as the $3,650 forfeiture assessed here and argues that those offenses were much more serious than its own: *Nutmeg Broadcasting Co.*, 39 Rad. Reg. 2d (P&F) 970 (1976) ($3000 forfeiture for violations of rules pertaining to station operation); *Bremen Radio Co.*, 27 Rad. Reg. 2d (P&F) 1453 (1973) ($3000 forfeiture for prearranging a station contest with intent to deceive the public); *OK Broadcasting Corp.*, 39 Rad. Reg. 2d (P&F) 536 (1976) ($3000 forfeiture for violation of the federal lottery statute); *WKRZ, Inc.*, 17 Rad. Reg. 2d (P&F) 995 (1969) ($4000 for violation of rules pertaining to logging practices and for equipment deficiencies).

II. DISCUSSION

6. In its NALF, the MSD found that Aircall had apparently failed to file a Notification of Status of Facilities, FCC Form 489, prior to beginning operations on Station KRM965. Failure to file a timely Form 489 is a violation of Section 22.9(b)(1). Aircall has not provided any information warranting reconsideration of the MSD's conclusion. Aircall's argument that the violation was inadvertent and was voluntarily corrected and reported is unavailing. It is well established that:

> [t]he fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee know he was doing the act in question. . . .

Mobile Radio Telephone & Paging Service, Inc., Mimeo No. 2397, (Com. Car. Bur., released February 16, 1983).[3] Aircall was aware of the time that it began operating its newly constructed station. Aircall has not alleged that its failure to file the Form 489 was purely in the nature of an accident caused by forces outside Aircall's control. In addition, a violation is deemed to be "repeated" within the meaning of the Communications Act if it continues for more than one day. Accordingly, its violation was both willful and repeated within the meaning of 47 U.S.C. §503(b).

7. Aircall's further argument, that the amount of $10 per day for each day of illegal system operation is arbitrary and excessive, is without merit. The Commission uniformly applies this rate of forfeiture in instances wherein the licensee failed to file a Form 489 when new station operations begin. *See e.g., Canby Telephone Association*, 5 FCC Rcd 731 (1990). None of the cases Aircall cites in its petition concern the same violation.

8. Aircall's argument that since the violation ended on January 21, 1987, it is only liable for the period of time between June 2, 1986, and January 21, 1987, or 233 calendar days, is correct. Section 1.80(c)(3) of the Commission's Rules states that no forfeiture may be imposed for violations, such as the one here, if the violation occurred more than one year prior to issuance of the NAL. Accordingly, we herein reduce Aircall's forfeiture to $2,330.00.

9. In view of the foregoing, and pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the rules, IT IS ORDERED, that Aircall Communications, Inc., forfeit to the United States the sum of two thousand three hundred and thirty dollars ($2,330.00) for the failure to file a Notification of Status of Facilities on FCC Form 489, in violation of Section 22.9(b) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission payable to the order of the Federal Communications Commission within 30 days of the release of this order. If the forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] At the time Aircall filed its application, Section 22.9(b) of the Rules stated that

> FCC Form 403 ("Application for Radio Station License or Modification Thereof Under Parts 22, 23, or 25") shall be filed:
>
> (1) Prior to the expiration date of the construction permit . . . .
>
> (2) Upon completion of construction or installation of a station in exact accordance with the terms and conditions set forth in the construction permit; and
>
> (3) Upon satisfactory completion of equipment tests in accordance with Section 22.212(a).

[2] Aircall further argues that the NALF was based on a section of the Commission's Rules which was repealed during the pendency of its construction permit. The NALF cited Aircall for violating Section 22.212, which required, in pertinent part, that grantees file a Form 403 after completion of operations tests. Section 22.212 was repealed effective February 27, 1984, prior to the expiration date of Aircall's construction permit. Although the NALF stated the incorrect rule section, it clearly specified the violation, *i.e.*, failure to file a Form 489 request for covering license. Accordingly, Aircall was on notice of the charges against it, and in fact addressed the charges in its instant petition.

[3] The fact that a licensee voluntarily notifies the Commission of a potential rule violation is a factor which is taken into account in setting the amount of a forfeiture. In this case, however, this mitigating circumstance was already taken into account in setting the proposed forfeiture level.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-260

In the Matter of

Amendment of Rules to Eliminate
Grandfathering Provisions
Applicable to Licensees on
MAS Frequencies

NOTICE OF PROPOSED RULE MAKING

Adopted: May 7, 1990; **Released: May 18, 1990**

By the Commission:

INTRODUCTION

1. Three "grandfathering" provisions, adopted in 1975, 1981-82, and 1988, are relevant to licensees on 900 MHz frequencies designated for multiple address system (MAS) operations in the Private Operational-Fixed Microwave Service (OFS).[1] By this *Notice of Proposed Rule Making*, we propose to modify the provisions adopted in 1975 and 1981-82 in order to require that all licensees on MAS frequencies comply with the current channelization plan for those frequencies and, with certain exceptions, the current 12.5 kHz bandwidth limitation.

2. MAS stations are point-to-multipoint microwave radio systems designed for two-way or one-way communications between a specific point and multiple fixed surrounding points.[2] Demand for MAS spectrum has risen dramatically in recent years. Consequently, we have undertaken several proceedings to allocate additional spectrum specifically for MAS systems and have adopted increasingly stringent technical standards to promote maximum use of that spectrum. [3] As a result of these numerous actions, and concomitant grandfathering provisions, stations occupying these bands operate with varying and non-conforming technical standards. This severely hampers efficient use of the spectrum in some portions of the country. Moreover, the lack of integration among these grandfathering provisions may be confusing to licensees on MAS frequencies. We tentatively conclude, therefore, that modification and clarification of the grandfathering provisions is in the public interest.

BACKGROUND

3. Prior to 1975, the Commission regulated private microwave systems by limited rule provisions of Parts 81, 87, 89, 91, and 93, which then covered, respectively, operations in the Maritime, Aviation, Public Safety, Industrial, and Land Transportation Radio Services. In 1975, the Commission established the Private Operational-Fixed Microwave Service as an independent radio service and consolidated in a new Part 94 all rules covering the licensing and operation of private microwave systems in the frequency bands above 952 MHz.[4] These rules established channeling plans that provided standards for frequency pairing and channel spacing. They also established channel bandwidths including, relevant to our purposes here, bandwidths ranging from 50 kHz to 200 kHz for point-to-point operations in the 952-960 MHz band. The Commission determined, however, that systems authorized prior to August 1, 1975, did not have to comply with the new channelization or bandwidth standards; rather, it grandfathered these systems, as authorized, indefinitely.[5] This grandfathering provision is now codified at 47 C.F.R. § 94.65, and, in effect, permits certain microwave systems to operate on MAS frequencies above 952 MHz without regard for current channelization standards and at bandwidths greater than the standard bandwidth permitted by current rules.

4. In the early 1980's, we allocated the 952-953 MHz band primarily for MAS operations and also allocated frequencies in the 928-929 MHz band for such use.[6] In the interest of promoting maximum use of these MAS bands, we modified the channelization of these bands, creating 34 frequency pairs and 20 unpaired frequencies. Of the frequencies allocated for use by licensees of MAS systems in the 1981 and 1982 proceedings, we reserved 20 of the 34 paired channels specifically for use by the Power Radio Service eligibles. *See 1982 Report and Order* at Appendix A. The remaining allocated frequencies are available for other MAS operations and, in some cases, common carrier operations under Part 22 of the Rules. We also established a standard bandwidth of 25 kHz, with additional bandwidth up to a maximum of 50 kHz available only upon an adequate showing of need.[7] To allow licensees of existing MAS systems time to amortize the cost of their equipment before making the modifications necessary to meet the new standards, we also determined that those systems authorized as of January 1, 1981, would not be subject to the channelization and 25 kHz bandwidth requirements until January 2, 1991.[8] We did not address in these orders the relationship between this 1981 grandfathering provision and the 1975 grandfathering provision. In response to a request for clarification of the two rules, the Private Radio Bureau determined that the 1975 grandfathering provision permits entities licensed prior to August 1, 1975, to continue operating indefinitely as licensed, while the 1981 grandfathering provision requires entities licensed on frequencies in the 928-929 and 952-960 MHz bands between August 1, 1975, and January 1, 1981, inclusive, to bring their operations into compliance with the revised standards by January 2, 1991.[9]

5. Finally, we adopted a third grandfathering provision, which we do not propose to modify, in a 1988 *Report and Order* that culminated a comprehensive review of the regulations and policies governing 900 MHz MAS systems. *Report and Order*, PR Docket 87-5, 3 FCC Rcd 1564 (1988) (*1988 Report and Order*). In the *1988 Report and Order* we again reduced the standard bandwidth for MAS channels, this time from 25 kHz to 12.5 kHz, with applicants being able to receive wider bandwidths up to a maximum of 50 kHz on a case-by-case basis only on a showing of need.[10] Again the objective in reducing the standard bandwidth was to meet the increasing demand for point-to-multipoint channels by increasing spectrum efficiency. Nevertheless, we grandfathered indefinitely 25 kHz MAS systems licensed as of May 11, 1988.[11] In so doing, we expressed the view that because of the

interwoven channeling plan adopted, the benefits of forcing these 25 kHz licensees to operate on 12.5 kHz frequencies would not be sufficient to outweigh the costs that such change would impose on the licensees.[12] We do not propose to modify this policy.

6. To summarize, as a result of Commission proceedings in 1975, 1981-82, and 1988, licensees on 900 MHz MAS frequencies operate according to several channelization and bandwidth regulations, depending on the date we authorized their operation. Pursuant to 47 C.F.R. § 94.65, licensees authorized prior to August 1, 1975, on any frequency available at that time for private operational fixed use, including many frequencies in the 952-960 MHz band now designated for use by MAS operations, may continue to operate as authorized. Most of these systems are point-to-point rather than point-to-multipoint operations, and some operate on channels paired differently than required by current rules and use bandwidths of 100 kHz or more. Pursuant to 47 C.F.R. § 94.65(a)(1), licensees authorized on 900 MHz MAS frequencies between August 1, 1975, and January 1, 1981, inclusive, may operate as authorized until January 1, 1991, after which they must comply with the provisions of this section. Pursuant to the same provision, as amended by the *1988 Report and Order*, licensees on these frequencies that were authorized to operate with a 25 kHz bandwidth limitation as of May 11, 1988, may continue to operate at that bandwidth indefinitely. Those licensed after May 11, 1988, however, must meet the current channelization requirements. Notably, these requirements call for stations to occupy no more than 12.5 kHz of bandwidth unless a special showing is included with the application. Thus, there are four categories of licensees on the 900 MHz MAS frequencies: those licensed before August 1, 1975; those licensed between August 1, 1975, and January 1, 1981, inclusive; those multiple address stations authorized to operate with a 25 kHz bandwidth limitation before or on May 11, 1988; and those multiple address stations authorized after May 11, 1988.

DISCUSSION

7. As mentioned in paragraph 4 above, the 1975 and 1981-82 grandfathering provisions have caused confusion among licensees attempting to comply with our Rules. Moreover, the effect of the provisions may be contrary to the public interest. Specifically, under the 1975 grandfathering provision, certain point-to-point systems continue to operate on MAS frequencies in the 952-953 MHz band. This result is not spectrally efficient, especially in light of the fact that there are many frequencies available for point-to-point operation and only a limited number available for point-to-multipoint operation.[13] Furthermore, some systems rely on technologically-outdated equipment that is incapable of operating in compliance with recent standards designed to maximize use of the relevant spectrum. Under the current grandfathering provisions these systems may continue in operation, in some cases indefinitely. Continued operation of these systems has, in the past, been justified on the basis of protecting business investment in equipment and plant. With the ever-increasing demand for point-to-multipoint channels, however, we must consider whether the benefits in spectrum efficiency that would result from requiring grandfathered licensees on the 900 MHz MAS frequencies to upgrade their systems outweighs the increase in equipment costs associated with making the upgrades.

8. Our initial analysis leads us to conclude that the public interest would be served by modifying the 1975 and 1981-82 grandfathering provisions. This will, among other things, allow us to remove from the 952-953 MHz band point-to-point operations that are incompatible with multiple address systems for which the band has been designated. While we estimate that only 21 grandfathered licensees will have to move to other frequencies, the number of channels that will become available for new MAS stations is significant.[14] Thus, we propose that all point-to-point systems using the 952-953 MHz MAS frequencies be required to change to frequencies designated for point-to-point operation, and that point-to-multipoint licensees on those same frequencies comply with the current provisions set forth in 47 C.F.R. § 94.65(a)(1).[15] Specifically, we propose to provide those systems that were licensed before August 1, 1975, five years from the date of adoption of the final order in this proceeding to either move to other frequency bands or to modify their systems such that they comply with the current provisions of Section 94.65. This proposal should not cause these licensees undue financial burden because five additional years should be ample time to depreciate most, if not all, equipment costs. Concerning those licensees that received their licenses between August 1, 1975, and January 1, 1981, those licensees must already comply with the provisions of Section 94.65 by January 1, 1991. When adopted, this policy meant that these licensees must operate multiple address stations on 25 kHz channels (unless more bandwidth is justified) and operate on the standard channel pairing. We do not propose to modify this provision.

9. At this time, we propose to continue grandfathering indefinitely MAS systems licensed after January 1, 1981, using channels with bandwidths up to 50 kHz.[16] These stations are operating efficiently in the sense that they are operating in conformance with the current channeling plan. Although some additional measure of spectrum efficiency may be obtained by bringing these licensees into compliance with the 12.5 kHz bandwidth standard, we are initially reluctant to do so because it would be administratively difficult for us to verify the spectrum requirements for all MAS stations licensed during this period. Nonetheless, we ask for comments on whether we should review the spectrum requirements of existing licensees in light of the current channeling plan. One option may be to conduct such reviews as part of these stations' next license renewal.

10. We request comment regarding all aspects of these proposals, including information on the number of systems that will be affected by the proposals, potential costs of modifying these systems to meet new standards, the benefits in terms of spectrum efficiency that would result from these changes, the appropriate timeframe for requiring adherence to the standards adopted, and any other matter deemed relevant to the issues discussed herein. Proposed amendments to Section 94.65(a)(1) are set forth in the Appendix attached to this Notice. A proposed amendment to Section 94.92, to make that provision consistent with proposed Section 94.65(a)(1), is also set forth in the Appendix.[17]

INITIAL REGULATORY FLEXIBILITY ANALYSIS

A. Reason for Action.

11. The Commission is proposing to amend Section 94.65 of our Rules to modify grandfathering provisions pertaining to licensees on 900 MHz MAS frequencies and to require licensees on 900 MHz MAS frequencies to comply with current channelization and bandwidth requirements within a specified timeframe. This action would further the Commission's goal of enhancing spectrum efficiency while protecting licensees' investment in equipment insofar as possible. It would be consistent with the Commission's recent review and revision of the rules and policies governing MAS operations in PR Docket No. 87-5.

B. Legal Basis.

12. The proposed action is authorized under Sections 4(i), 303(g), and 303(r) of the Communications Act of 1934, as amended. 47 U.S.C. §§ 154(i), 303(g), and 303(r).

C. Reporting, recordkeeping, and other compliance requirements.

13. No new reporting or recordkeeping requirements will be imposed upon licensees because of this action. Some existing licensees will have to modify their systems to comply with different technical standards.

D. Federal rules which overlap, duplicate, or conflict with this rule.

14. None.

E. Description, potential impact, and number of small entities involved.

15. The increased spectrum efficiencies from this action could provide many additional small entities the opportunity to satisfy latent communications requirements. The requirement for some licensees to modify or change equipment will have a negative impact, but will be minimized by providing a long lead time before they must comply with the new rules. The number of small entities that will be affected is approximately 21.

F. Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives.

16. None.

PAPERWORK REDUCTION ACT STATEMENT

17. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection or recordkeeping, labeling, disclosure or record retention requirements. Some licensees will be required to modify their licenses to operate on different frequencies.

PROCEDURAL MATTERS

18. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R § 1.1203.

19. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R § 1.1202(b). Any person who submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

20. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 C.F.R. § 1.1206.

21. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r). Interested persons may file comments on or before **July 13, 1990,** and reply comments on or before **July 30, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

22. In accordance with the provisions of Section 1.419 of the Commisison's Rules, 47 C.F.R. § 1.419, formal participants shall file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspec-

tion during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 94 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation would continue to read as follows:

Authority: Secs 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. 47 C.F.R. § 94.65 is proposed to be amended by revising the introductory paragraph and paragraph (a)(1) to read as follows:

§ 94.65 Frequencies.

Frequencies normally available for assignment in this service are set forth with applicable limitations in the following tables:

(a) 928-960 MHz

(1) Multiple Address System frequencies. Multiple address system (MAS) frequencies are available for the point-to-multipoint transmission of a licensee's products or services, excluding video entertainment material, to a licensee's customer or for its own internal communications. The paired frequencies listed in this section shall be used for two-way interrogate/ response communications between a master station and remote stations. Each master station operating on one of the paired channels is required to serve a minimum of four separate active remote stations. Ancillary one-way communications on paired frequencies are permitted on a case-by-case basis. Ancillary communications between interrelated master stations are permitted on a secondary basis. The normal bandwidth assigned will be 12.5 kHz. Upon adequate justification, however, additional contiguous channels may be authorized to provide up to a 50 kHz bandwidth. Tables 2, 4, and 6 list frequencies with 25 kHz bandwidth. When licensed for a larger bandwidth, the system still is required to use equipment which meets the +0.00015 percent tolerance requirement. (*See* § 94.67(a)). Systems licensed after January 1, 1981, on channels with bandwidths up to 50 kHz will be grandfathered indefinitely. Systems licensed between August 1, 1975 and January 1, 1981 may continue to operate as licensed until January 1, 1991, at which time they must comply with the provisions of this section. Systems licensed prior to August 1, 1975 may continue to operate as authorized until [five years from the date of adoption of the *Report and Order* in this proceeding] at which time they must comply with the requirements set forth in this paragraph.

* * * * *

3. 47 C.F.R. § 94.92 is proposed to be amended by revising the introductory paragraph to read as follows:

§ 94.92 Technical standards for stations authorized prior to July 1, 1976.

Except as otherwise required by § 94.65(a)(1), the technical standards indicated in the table in this section apply to private microwave systems using the frequency bands above 952 MHz listed in the table and which were authorized prior to July 1, 1976, but after July 20, 1961. These standards shall not be applicable to transmitting equipment, including antennas, which was authorized to be operated on these frequencies prior to July 20, 1961, or for which an authorization was issued based on an application filed with the Commission prior to July 20, 1961.

* * * * *

FOOTNOTES

[1] *See* 47 C.F.R. §§ 94.65 and 94.65(a)(1).

[2] *See* 47 C.F.R. § 94.3. Frequencies currently designated for use by MAS licensees are listed at 47 C.F.R. § 94.65(a)(1) and are in the 928-929, 932-932.5, 941-941.5, and 952-953 MHz bands.

[3] *See* paragraphs 3-6 *infra*.

[4] *Report and Order*, Docket No. 19869, 52 FCC 2d 894 (1975) (*1975 Report and Order*). Frequencies in the 928-929 MHz band, now designated for use by licensees of MAS systems, were allocated to OFS in the early 1980s. *See* paragraph 4 *infra*.

[5] The Commission gave licensees until August 1, 1985, to bring their systems into compliance with certain other technical standards. *See 1975 Report and Order* at paragraph 17. Later, it determined that transmitting equipment authorized between July 20, 1961, and July 1, 1976, would be permitted to operate indefinitely in accordance with former technical standards set forth in 47 C.F.R. § 94.92 as long as interference did not exceed specified levels. *See* 47 C.F.R. §§ 94.61(a) and 94.92.

[6] *Report and Order*, SS Docket No. 79-18, 48 RR2d 1183 (1981) (*1981 Report and Order*); *Second Report and Order*, SS Docket No. 79-18, 88 FCC 2d 1173 (1982) (*1982 Report and Order*).

[7] *1981 Report and Order* at paragraph 10.

[8] When 47 C.F.R. § 94.65(a)(1) was amended in 1988, we inadvertently omitted the language setting forth the January 1, 1991 deadline for compliance. This oversight is being corrected in this proceeding.

[9] The relationship between these grandfathering provisions was raised in our Memorandum Opinion and Order, PR Docket No. 87-5, 4 FCC Rcd at 2491, n. 22. We indicated that we would initiate a separate proceeding to clarify the several grandfathering policies pertaining to these frequency bands.

[10] MAS users can be licensed for contiguous 12.5 kHz channels up to a maximum bandwidth of 50 kHz. 1988 *Report and Order* at paragraph 17.

[11] The 1988 *Report and Order* incorrectly stated that systems authorized prior to May 1, 1988, would be grandfathered. This error was subsequently corrected. *See* 3 FCC Rcd 2467 (1988).

[12] *See 1988 Report and Order* at 1566.

[13] Only 4 of 13 OFS bands have frequencies available for point-to-multipoint operations: 900 MHz, 2.5 GHz, 10.6 GHz, and 18 GHz.

[14] One 100 kilohertz point-to-point channel could preclude the use of that spectrum for eight 12.5 kHz multiple address systems in a given area.

[15] We note that by the Commission's Second Report and Order, Gen. Docket No. 82-243, 4 FCC Rcd 2012 (1989), aff'd, Memorandum Opinion and Order, Gen. Docket No. 82-243, FCC 90-64 (Feb. 8, 1990), additional channels of 25, 50, 100, and 200 kHz bandwidths were made available in the 932.5-935 MHz and 941.5-944 MHz bands for point-to-point OFS use.

[16] Because certain licensees with channels up to 50 kHz bandwidth in compliance with our current rules have previously demonstrated the need for the additional spectrum, we propose to permit these systems to continue to operate as licensed.

[17] Section 94.92 will continue to apply to OFS stations not operating on the MAS frequencies. Such stations that were licensed between July 20, 1961 and July 20, 1976 may continue to operate pursuant to the technical standards specified in that section.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-2
Phase I

In the Matter of

Filing and Review of Open
Network Architecture Plans

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: April 12, 1990; Released: May 8, 1990

By the Commission:

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I. INTRODUCTION

1. On November 17, 1988, the Commission adopted the *BOC ONA Order*,[1] approving in part the Open Network Architecture (ONA) plans of each of the Bell Operating Companies (BOCs), but requiring various modifications to each plan. Eleven parties petitioned for reconsideration of various aspects of that order.[2] While a decision on these petitions was pending, each of the BOCs filed an amended ONA plan, on May 19, 1989, pursuant to our directions in the *BOC ONA Order*. In the instant order, we grant aspects of petitioners' requests by: (a) declaring that certain Operations Support System (OSS) capabilities should be classified as ONA services; and (b) modifying the installation and maintenance reporting requirements of the BOCs. We deny the remaining petitions. Our companion *BOC ONA Amendment Order* [3] concludes that the amended plans comply substantially with the requirements of the *BOC ONA Order*, establishes a process for removal of structural separation requirements, and establishes procedures for ongoing oversight of the ONA process.

II. BACKGROUND

2. The *Computer III* proceeding created a new regulatory framework to govern BOC participation in the enhanced services marketplace and to open up network capabilities to competing providers of enhanced services.[4] The Commission concluded that, relative to nonstructural safeguards, the structural separation requirements adopted in the *Second Computer Inquiry* imposed significant costs on the public in terms of decreased efficiency and innovation. The Commission established a regulatory regime based upon nonstructural safeguards designed to prevent anticompetitive practices by the BOCs while fostering the availability of enhanced services to the public on an efficient basis.

3. ONA requirements are a key component of our nonstructural safeguards. Under ONA, the BOCs must unbundle basic service building blocks and offer all enhanced service providers (ESPs) equal access to these unbundled network elements. The ONA requirements include nine specific Comparably Efficient Interconnection (CEI) parameters, pricing and tariffing requirements, as well as other nonstructural safeguards. The Commission also specified criteria to govern BOC responses to ESP requests for the unbundled basic service elements that we describe as ONA services. These requirements stimulate the development of enhanced services by providing ESPs with opportunities to utilize the BOCs' networks in new and efficient ways.

4. In establishing the ONA policy, the Commission specifically declined to dictate a particular network design for ONA. Instead, recognizing the complexity of the process, the Commission articulated the principles underlying ONA and instructed the BOCs to work with ESPs and other interested parties to develop a design that reflects these ideas. The Commission directed the BOCs to file ONA plans on February 1, 1988, and conditioned removal of the structural separation requirements on approval and implementation of these plans. In the interim, the Commission permitted the BOCs to offer specific enhanced services on an unseparated basis pursuant to approved service-specific CEI plans.

5. The BOCs filed their initial ONA plans, as directed, on February 1, 1988. The *BOC ONA Order* concluded that the initial ONA plans reflected substantial efforts by the BOCs, and were a positive first step towards realization of our ONA policies. The Commission found, however, that each plan had to be modified in certain respects.

6. First, the Commission approved, with certain modifications, the common ONA model developed by the BOCs and Bell Communications Research, Inc. (Bellcore) for the initial implementation of ONA. Under the Commission's ONA model, ESPs obtain access to various optional, unbundled ONA services, termed Basic Service Elements (BSEs), through access links described as Basic Serving Arrangements (BSAs). Other elements of the model include Complementary Network Services (CNSs), which are optional, unbundled basic service features that an end user may obtain for its line in order to receive or utilize an enhanced service, and Ancillary Network Services (ANSs), which are unregulated services, such as billing and collection, that may be useful to ESPs.

7. Second, the Commission generally accepted as adequate the BOCs' proposed initial ONA service offerings. Noting differences among the BOCs in these offerings, however, the Commission required each BOC that had not already done so, to review the plans of the other BOCs and to augment its initial offerings, to the extent possible, based on this review.

8. Third, the Commission recognized the Information Industry Liaison Committee (IILC) as the proper vehicle for inter-industry efforts to address a number of technical ONA issues. The Commission directed the BOCs to continue working through the IILC to achieve greater uniformity in nomenclature, technical characteristics, availability, and deployment of ONA services, and to amend their plans to reflect progress in these areas.

9. Fourth, the Commission rejected suggestions that all ONA servces be tariffed exclusively in the federal jurisdiction and concluded instead that ONA service offerings that are subject to "dual jurisdiction" as common carrier communications services must be tariffed at both federal and state levels. The Commission required each BOC to offer interstate ONA services through federal tariffs providing interstate access services as BSAs and offering unbundled interstate BSEs with such access services to the extent technically feasible.[5] The Commission also stated that it would initiate a Rule Making proceeding to amend Part 69 of our rules to accommodate unbundled BSEs.[6] In addition, the Commission scrutinized the BOCs' state tariffing plans to ensure that these plans did not undermine fundamental ONA objectives and were sufficiently clear and complete. The Commission found that the Ameritech and NYNEX plans satisfied this test, and directed the other BOCs to provide additional information on their tariffing plans. The Commission also rejected a BellSouth plan that would have precluded ESPs from using their existing access arrangements.[7] To address issues of joint concern to federal and state regulators, we established a Joint Conference of FCC Commissioners and state Commissioners representing each of the seven BOC regions.

10. Fifth, the Commission required the BOCs to file three-year deployment schedules for their initial ONA services showing the percentage of access lines, on a system-wide basis and in designated market areas, on which they will offer each of their initial ONA services.[8] The Commission also asked the BOCs to include in these schedules any future services that they will introduce prior to July 1992.[9] In addition, the Commission directed the BOCs to describe their plans for deploying advanced technologies such as CCS7, ISDN, and Intelligent Network, and to describe ONA services that they will be able to offer through these technologies.[10]

11. Finally, the Commission further refined the BOCs' implementation of the nonstructural safeguards. In particular, the Commission eliminated certain unnecessary reporting requirements, modified the format for the installation and maintenance reports, approved the BOCs' network information disclosure plans, and required certain changes in their customer proprietary network information (CPNI) plans.[11]

III. THE ONA MODEL

A. Unbundling Issues

1. Fundamental Adequacy of the ONA Plans

12. As part of ONA, the *Phase I Order* required carriers to unbundle basic service "building blocks" and to develop an initial set of such elements "to the extent technologically feasible."[12] The *BOC ONA Order* declined to expand this obligation to require a radical reconfiguration of the BOC network or a further unbundling of BSAs at this time.[13] The *BOC ONA Order* found the ONA model to be consistent with the unbundling principles of the *Phase I Order*, but asked the IILC to address the potential technical and operational problems posed by more extensive unbundling, recognizing its possible pro-competitive effects in the enhanced services market in the longterm.[14]

13. Various parties take issue with the level of unbundling required in the *BOC ONA Order*. The ONA Users Group asks us to reconsider the decision not to require the BOCs to permit interconnection of lines owned by third parties at BOC central offices. It asks us instead to require BOC provision of transmission facilities interconnection when our *Part 69* proceeding is completed. It also expresses concern that the BOCs will restrict ONA to the confines of the ONA model and asks that we clarify that future technology should move toward a more "modularized architecture".[15] Certain parties criticize the ONA model generally as being more bundled than existing offerings, though without citing specific examples.[16]

14. Several parties also urge that this Commission not lift structural separation without requiring greater unbundling by the BOCs.[17] Many express concern that once structural separation is lifted, the BOCs will have no

further incentive to open their networks,[18] and this Commission will no longer have a meaningful opportunity to review the manner in which the BOCs satisfy their obligations to offer nondiscriminatory access.[19] For the reasons given below, petitioners' requests are denied.

15. We find no new arguments on reconsideration that require any change in our conclusions in the *BOC ONA Order* about the fundamental adequacy of the ONA model, as modified. Our *Computer III* policies were never intended to dictate a "flash cut" to new technologies or configurations.[20] The *Phase I Order* required unbundling "to the extent technologically feasible."[21] Its approach was evolutionary. For example, in the interim while ONA plans were being developed, the BOCs were allowed to integrate their basic and enhanced services operations on a service-specific basis, using Comparably Efficient Interconnection (CEI) plans.[22] As in the *BOC ONA Order*, we find that the ONA model adequately reflects existing technologies.[23] In the *BOC ONA Amendment Order*, we continue this progressive approach, requiring, for example, annual updated deployment plans.[24]

16. It would be unwise to direct, as the ONA Users Group suggests, the implementation of a particular network technology at this stage. We agree with NYNEX that at this early point in ONA implementation we should not make the development of ONA dependent on particular technologies.[25] We regard fundamental unbundling as a more long-term question, and have asked for the input of the IILC on the potential technical and operational difficulties involved.[26]

17. Given our evolutionary view of ONA and the continuing obligations of the BOCs, we do not believe that fundamental unbundling on the order of mandatory interconnection or "modularized" technology must precede the lifting of structural separation. The BOC ONA plan amendments demonstrate "fairly widespread deployment of a large number of ONA services over a broad cross-section of communities."[27] We are requiring not only annual deployment plan updates, but also an additional amendment from the BOCs to be filed in April 1991, addressing long-term issues such as the implementation of Common Channel Signalling System 7 (CCS7), Integrated Services Digital Network (ISDN), and Intelligent Network (IN) technologies.[28] As noted in the *BOC ONA Amendment Order*, we will, as appropriate, order the deployment of new ONA services and require further amendments to the ONA plans.[29] Further unbundling remains an important long-term objective of ONA. On the road, however, toward achieving this long-range objective, prudence requires that we permit the BOC network operations to digest ONA-inspired changes and the ESPs' market response before considering any action to order more dramatic unbundling.[30]

18. Contrary to API's position,[31] our decisions on unbundling and use of the ONA model provide adequate control over BOC use of the local exchange monopoly. We apply full *Computer III* obligations to BSAs and BSEs and nondiscrimination requirements to CNSs.[32] We require that interstate BSAs and BSEs be tariffed at the federal level, and we review state tariffing plans for fundamental inconsistency with ONA principles.[33] ONA unbundling permits ESPs to take only those BSEs that they need for their services. As SWBT observes,[34] additional *Computer III* requirements provide for ongoing oversight of the ONA process, ensuring that ONA will continue to evolve and that the BOCs will continue to adhere to their nondiscrimination obligations even after structural separation is lifted. For example, the BOCs must continue to comply with their cost allocation plans, provide annual installation and maintenance statistics as part of our nondiscrimination reporting requirements, and pay the same tariffed rates as competitors when they take the same network services.[35] Thus, contrary to the fears of some parties, we have ample opportunity to review the manner in which the BOCs satisfy their equal access obligations and to ensure that ONA is fulfilling its objective of preventing unfair competition.[36]

2. BSAs and BSEs

19. Several parties object to the BSA/BSE construct, some arguing against the "tying" of BSEs to BSAs.[37] They argue that the BSA/BSE construct is inherently anticompetitive, precluding ESPs from using "alternative forms of local access,"[38] and restricting user choice.[39] ADAPSO argues that the concept can result in higher prices for ESPs. It observes that if BOCs implemented two-way measured charge BSAs, and BSEs represented only a comparatively small part of the BSA/BSE package, ESPs would pay significantly more for equivalent service.[40]

20. ADAPSO states that it seeks "reformation", not reconsideration, of the ONA model, and merely asks that we modify the model by prohibiting the bundling of BSAs and BSEs.[41] According to API, non-carrier customers should have access to all BSEs technically compatible with a given BOC service, intrastate or interstate.[42] API states that this will preclude inflation in rates of basic services to which BSEs are tied and artificial market segmentation and prevent the BOCs from defining the manner in which users and ESPs use BSEs in developing their own enhanced services. API states that ONA at a minimum must mean that users and ESPs have the option to select the network services they desire, subject only to a reasonable technical feasibility standard.[43] For the reasons given below, petitioners' requests are denied.[44]

21. The ONA model does not mandate use of any particular BSE with any given BSA, except as technically required. At this stage of network development, an underlying access arrangement or BSA is necessary for basic transmission. BSAs and BSEs are therefore not "tied" together in the ONA model, other than through technological necessity. We agree with Bell Atlantic that the purpose of the model is to guide ESPs to the BSAs that are technically and operationally compatible with particular BSEs.[45]

22. We distinguish the effect of the ONA model from that of state or federal tariffing and pricing rules and policies, which ONA does not necessarily displace or change. The question, for example, whether a line side connection should be available on a flat-rated or two-way measured basis, is a question in the first instance for the appropriate jurisdiction exercising tariffing authority over those BOC network services. We are at the present time considering the means by which ONA services should be implemented in the federal access tariffs.[46] The Joint Conference is discussing possible recommended uniform tariff guidelines, and the *BOC ONA Amendment Order* requires BOCs to provide further information regarding their state tariffing plans.[47] We need not address or decide those issues in order to reject petitioners' request that we prohibit all "tying" of BSAs and BSEs in both federal and state ONA tariffs.

B. Operations Support Systems (OSS)

23. The *BOC ONA Order* did not require the BOCs to offer OSS services under ONA at that time, but directed the BOCs to amend their plans to specify the OSS services that they are capable of offering to ESPs in the near term, and to discuss their ability to offer such services in the future. Recognizing that a number of technical, security, and network control issues associated with OSS might need to be resolved before customers can access the BOCs' internal systems, the Commission directed the BOCs to examine, through the IILC, the most feasible means of providing OSS access for ESPs.[48]

24. In requests supported by API and MCI, ADAPSO and EDS petition the Commission to reconsider the decision to refrain from requiring an OSS offering. They ask the Commission to rule that all OSS services that provide network monitoring and diagnostic capabilities should be made available to ESPs as BSEs subject to ONA safeguards. They contend that network diagnostics and information about the network are "part and parcel" of the process of providing basic service, have historically been provided as part of BOC basic service offerings, and fall within the Commission's definition of "basic service element." Alternatively, ADAPSO and EDS ask the Commission to require BOCs providing OSS to their own enhanced service operations to make such services available to competing ESPs on a nondiscriminatory basis. Those petitioners claim the Commission has imposed such a requirement on AT&T.[49] EDS adds in reply that recent reports indicate that the technical difficulty argument advanced by a number of the BOCs is a "red herring," and that some carriers have actually developed systems to provide users with access to network management and control services.[50]

25. All the BOCs oppose the petitions for reconsideration.[51] For example, BellSouth argues that the Commission should not re-regulate those OSS services that are unregulated competitive services. BellSouth already plans to provide as regulated ONA services most OSS services that are subject to limited competition. It contends that the Commission need not impose additional regulation over OSS services so long as OSS services are made available to ESPs on reasonable, nondiscriminatory terms and conditions, on either a regulated or nonregulated basis.[52] Pactel contends that the Commission's *Computer III* orders did not require the BOCs to provide the advantages of integration to other ESPs, and that ADAPSO and EDS improperly assert that unaffiliated ESPs are entitled to OSS services used by a BOC's enhanced service operation.[53] NYNEX agrees that no need exists for further regulation, noting that it is active in IILC discussions on ESP access to OSS.[54] SWBT asserts that EDS' requests fail to acknowledge the potential problems with unlimited access at this time, and suggests that the Commission analyze the BOCs' amendments before deciding which, if any, BOC OSSs should be made available to ESPs as ONA services.[55]

26. After review of the additional information provided by the BOCs in their amended ONA plans and in *ex parte* presentations in this proceeding and consideration of the arguments raised here, we conclude that certain OSS capabilities would be useful to ESPs and should be classified as ONA services under our ONA rules.[56] These services consist of: (1) service order entry and status;[57] (2) trouble reporting and status;[58] (3) diagnostics, monitoring, testing, and network reconfiguration;[59] and (4) traffic data collection.[60]

27. The *BOC ONA Order* distinguishes between regulated basic services desired by ESPs or their customers, which are ONA services under the Commission ONA Model, and unregulated, competitive services useful to ESPs, which are ancillary services.[61] The *NATA / Centrex Order* [62] stated that although the definitions of basic and enhanced services are intended to limit the scope of tariffed basic service to the provision of a pure transmission services, the Commission did not intend to foreclose carriers from using the processing and storage capabilities within their networks to offer optional tariffed features that facilitate use of traditional telephone service.[63] That order determined that certain computer processing services were adjuncts to basic services, and thus should be classified as basic rather than enhanced services despite a possible contrary reading of the enhanced service definition.[64]

28. We find that the OSS services listed above are basic services or adjunct to basic services treated as basic under *NATA / Centrex*. The *NATA / Centrex Order* ruled that the Centrex Custom Change Feature (CCCF) was adjunct to basic telephone service. CCCF was described as a service that allows a customer to use a data terminal on his premises to transmit to the central office desired changes in the customer's Centrex service.[65] The service automated the usual service order process, the same function that the service order entry OSS performs. We believe that such OSS capabilities as service order entry, service order status, along with trouble reporting and status services, should be treated in the same way as CCCF, *i.e.*, as basic services. In addition, services like diagnostics, monitoring, testing, and reconfiguration are directly related to management of the ESP's basic telephone service, do not alter the fundamental character of the service, and merely maintain the ability to continue to receive network services. These should also be treated as basic under the *NATA / Centrex* rationale. In the *Computer II Final Decision*, the Commission listed traffic management studies as services that could be provided by carriers under tariff because the information so provided is directly related to management of the customer's telephone service and does not change the nature of basic telephone service.[66] We believe that traffic data collection fits within this category and is properly a basic service. [67]

29. These conclusions do not, contrary to BellSouth's contentions, impose unnecessary regulation on these OSS capabilities, but merely are the result of applying the classifications of the Commission ONA model. We also do not agree with Pactel's blanket assertion that OSS capabilities are ancillary,[68] as we have just shown that the four categories listed above are basic ONA services. We reach no conclusion, however, on the regulatory status of any OSS capability other than those specifically discussed above.[69] In addition, specific ESP requests for any of these OSS services must, of course, be evaluated based on expected market demand, their utility as perceived by ESPs, and the technical and cost feasibility of unbundling and providing those services.[70]

C. Billing and Collection

30. The *BOC ONA Order* declined certain ESPs' requests that we require the BOCs, pursuant to ONA, to offer billing and collection services, which are not regu-

lated as Title II common carrier services, but are subject to our Title I authority as services incidental to communications. That order also required all BOCs to explain in detail in their amended ONA Plans any plans to offer services that would provide ESPs with information useful for bill preparation (such as the calling number, billing address, or call duration), and requested the IILC to consider possible means of providing such information.[71]

31. ADAPSO and the ONA Users Group petition the Commission to reconsider that decision. ADAPSO asks that we direct the BOCs to provide detariffed billing and collection, and related services, to unaffiliated ESPs on an unbundled basis pursuant to the same rates, terms, and conditions that such services are made available to the BOCs' own enhanced service operation. This is necessary, according to ADAPSO, because the BOCs provide enhanced services and therefore have an incentive to discriminate against independent ESPs in the provision of billing and collection service.[72] The ONA Users Group argues that the Commission should not exempt from ONA requirements any recordation services provided to ESPs until it is sure that these services are subject to competition,[73] and that the information sought in the *BOC ONA Order* is insufficient to ensure that these services are offered by the BOCs on reasonable terms and conditions.[74] Until the Commission determines whether billing and collection for enhanced services is subject to competition, the ONA Users Group contends that we should either exercise our Title I jurisdiction over the BOCs' provision of such services, or require the BOCs to unbundle the monopoly elements of their billing operations and offer those functions as BSEs.[75] ANPA joins ADAPSO and the ONA Users Group to argue that the filing of the amended ONA plans do not satisfy ESP concerns about nondiscriminatory access to billing and collection services because the Commission did not establish any such requirement in the *BOC ONA Order*.[76]

32. The BOCs commenting on this issue all oppose the requests for reconsideration.[77] For instance, Ameritech and Pactel argue that the petitioners have not raised new considerations that justify reconsideration.[78] BellSouth states that it already plans to provide to ESPs most services subject to limited competition, such as network recording information, as regulated ONA services.[79] While agreeing with the other BOCs that the Commission's treatment of billing and collection is correct, NYNEX also states that it has already voluntarily committed to provide network-related ancillary services, such as billing and collection, in a nondiscriminatory manner.[80]

33. No new arguments have been presented that convince us that our decision in the *BOC ONA Order* was incorrect. We therefore deny the petitions regarding this issue. At present ESPs are generally able to bill their subscribers without our mandating that BOCs perform such services for them.[81] Petitioners have offered no evidence that the circumstances that led to our previous declaration that billing and collection services provided to IXCs are not Title II services, are inapplicable in this case.[82] Petitioners also have not demonstrated that market conditions will require that such services be provided by the BOCs in order to ensure the success of the *Computer III* and ONA policies.

34. In addition, we find it unnecessary to change the *BOC ONA Order* concerning the provision of billing information services.[83] Typical ESP network configurations, generally involving lineside access, appear to make provision of the recording type services available to IXCs with trunk-side connections irrelevant to ESP needs. We believe that it would be premature to mandate the provision of any billing information services at this time. We will continue to pursue the issue of BOC provision of underlying information useful for ESPs to perform their own billing in our continuing oversight of the BOC ONA Plans. For instance, the *BOC ONA Amendment Order* requires the BOCs to report on their implementation of IILC recommendations in this area in April 1991.[84]

IV. JURISDICTION, TARIFFING, AND PRICING

A. Background

35. The *BOC ONA Order* concluded that interstate ONA services should be available in federal tariffs for customers who wish to purchase those services. That order stated that existing access arrangements could be BSAs for federal tariffing purposes and required the BOCs to offer all interstate BSEs technically compatible with such interstate access arrangements in their federal access tariffs.[85]

36. Although the order required "full federal tariffing" of BSAs and BSEs, that order declined to extend this requirement to CNSs. CNSs are state-tariffed services provided on end users' lines, many of which are on the order of "Custom Calling" services.[86] In this proceeding, some parties challenge our jurisdiction to federally tariff BSEs, while others request that we extend federal tariffing requirements to CNSs.[87]

B. Federal Tariffing of BSEs

37. Pactel argues that BSEs are not transport "links" in an end-to-end interstate communication, but "features and functions" located entirely within a state. Pactel takes issue with the statement in the *BOC ONA Order* that "when an enhanced service is interstate (that is, when it involves communications between points in different states on an end-to-end basis), the underlying basic services are subject to Title II regulation."[88] Many parties oppose Pactel's view.[89]

38. The Communications Act gives this Commission authority over "interstate and foreign communication by wire or radio."[90] The Act defines "wire communication" as:

> the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection *between the points of origin and reception of such transmission*, including *all instrumentalities, facilities, apparatus*, and *services* (among other things, the receipt, forwarding and delivery of communications) *incidental* to such transmission.[91]

BSEs, including those described as "features" in Pactel's pleadings,[92] are network services that fall within the definition of "wire communication" as "incidental" to an underlying transmission. When used in connection with an end-to-end interstate transmission,[93] therefore, BSEs are subject to our jurisdiction.

39. We disagree with BellSouth's contention that this Commission has jurisdiction to require unbundled interstate BSEs only to the extent the BSEs are part of existing

offerings described in bundled interstate tariffs or BellSouth voluntarily offers BSEs through interstate tariffs.[94] Section 203 of the Act relates to the filing of tariffs "for interstate and foreign wire or radio communication."[95] Because interstate BSEs are interstate communication services, this section gives us the authority to require the BOCs to include charges for BSEs used in connection with interstate transmissions in interstate tariffs.

40. In many cases, our decision in the *BOC ONA Order* to require federal tariffing of interstate BSEs merely allows the continuation of the existing federal tariffing of such elements. As some parties have observed,[96] the BOCs have traditionally tariffed certain BSEs in their interstate tariffs.[97] Moreover, we will not distinguish, despite Pactel's suggestion, BSE "features and functions" from other services, instrumentalities or facilities "incidental" to an interstate transmission. Although such BSEs generally involve software modifications in the stored program control portion of the BOC's local switch, so do other switching functions, such as hunting, that we already classify as basic services and are offered in the federal tariffs.[98]

41. The description of interstate BSEs in the *BOC ONA Order* comports with this assessment of our jurisdictional authority. Pactel argues that the Commission's "definition" of interstate BSE does not even meet our own criteria for evaluating the jurisdictional character of a service based on the interstate or intrastate nature of a communication.[99] Pactel adds that BSEs are "similar to services like "Touchtone," which is traditionally an intrastate service. Pactel states that "[u]nder the Commission's test, however, Touchtone would be interstate simply if requested by someone."[100]

42. Pactel's interpretation of certain footnote language in the *BOC ONA Order*[101] is extraordinary, and in error. The order states clearly in a number of places that interstate BSEs are those offered with interstate BSAs.[102] An interstate BSA is by definition part of an end-to-end interstate communication.[103] A BSE offered in conjunction with such a BSA would therefore also be part of an end-to-end interstate transmission, pursuant to Section 3(a) of the Act.[104] The footnote quoted by Pactel merely clarifies that regardless of the BOC's initial classification of a given element in its ONA Plan (*i.e.*, as a BSE, BSA, CNS, or ANS), that element must be offered in federal tariffs if it qualifies as a BSE under the Commission ONA model adopted in the *BOC ONA Order*. The footnote's unstated premise remains that "interstate" BSEs are associated with "interstate" BSAs offered in interstate tariffs.[105]

43. Thus, we reiterate that any offering of BSEs, as defined in the *BOC ONA Order*, must be made available in the interstate tariffs when such BSEs are technically compatible with interstate access arrangements.[106] This procedure falls within our authority under the Communications Act and, contrary to Pactel's contention, is not overly broad.[107]

44. Critical policies, such as ensuring the nationwide availability of enhanced services, underlie our decision to exercise jurisdiction over interstate BSEs. ESPs will be using ONA services to provide interstate enhanced services, making "the proper exercise of federal authority. . .critical to successful implementation of ONA objectives, including prevention of discrimination and anticompetitive activity in the enhanced service marketplace."[108] Interstate tariffs provide ESPs with an important service option for their interstate traffic. Federal tariffs for ONA services are also likely to spur more national uniformity in nomenclature, terms and conditions and rate structures for ONA services than would otherwise be the case. Such uniformity would facilitate the provision of nationwide enhanced service offerings. Moreover, federally tariffed ONA services are important to interexchange carriers carrying ESP traffic interstate. Because interstate interexchange carriers are required to purchase federal access, when they provide interstate transmission for ESPS that lack their own interstate networks, interexchange carriers must be able to purchase BSEs out of federal tariffs. We therefore agree with AT&T that for interexchange carriers to provide interstate transport of BSEs (an ONA requirement for AT&T),[109] these elements must be federally tariffed.[110]

45. We have appropriately circumscribed our exercise of authority to the interstate sphere. Our federal tariffing requirement does not preempt the states from separately tariffing these services on an intrastate basis. Indeed, the dual tariffing of these services is essential to the implementation of ONA, and we encourage our sister jurisdictions to exercise their tariffing authority. Such shared jurisdiction is consistent with the present dual tariffing regime for basic services, which employs both state and federal access tariffs.[111] Indeed, many ONA services, including BSEs, are now tariffed federally.[112] Because, under this regime, states retain control of the tariffing of intrastate services, we do not agree with Pactel and BellSouth[113] that federal tariffing of interstate BSEs would violate Section 2(b)(1) of the Communications Act.[114] Similarly, cases such as *Louisiana Public Service Commission v. FCC*,[115] which concern preemption of intrastate activities, are inapposite. Under the framework we contemplate, states would retain control of intrastate ONA services. This dual jurisdictional system is consistent with the Communications Act.[116]

46. We recognize the critical role states will play in developing the architecture of our future telecommunications infrastructure, and the innovative approaches on which many have embarked. To carry out our statutory obligations to ensure the availability of "a rapid, efficient, Nation-wide . . . communication service,"[117] however, we must decline to "forbear" from requiring any federal tariffing of interstate ONA elements, particularly BSEs.[118] For the reasons given above, we cannot accomplish the federal objective of bringing national Information Age services efficiently to the American public, wherever located, if we totally cede our authority to provide for dual tariffing of BSAs and BSEs. We are, however, sensitive to state concerns about the possible implications of dual jurisdiction, and have worked with the states to identify and assess any negative potential. We also have deferred to state policies that are consistent with our federal ONA objectives. In the *BOC ONA Order*, we rejected suggestions that we interfere with state regulation of CNSs, and we reaffirm that decision in this order. Subsequent to the *BOC ONA Order*, the Commission tentatively decided not to permit "mixing and matching" of state and federal BSAs and BSEs, in part out of deference to state policies that could be undermined by such an arrangement.[119] The Commission also tentatively decided not to change the form of the ESP exemption, so that ESPs could continue to use state-tariffed BSAs for their interstate traffic.[120] We will continue to search for ways to accommodate legitimate state concerns in the ONA process, while fulfilling our federal responsibilities, most notably

through coordination and cooperation with the states on such matters through the Section 410(b) Joint Conference, whose tenure we recently extended until June 30, 1992.[121]

C. State Tariffing Issues

1. State Tariffing of CNSs

47. The BOC ONA Order distinguished between BSEs, features offered with BSAs that ESPs may find useful in configuring an enhanced service, and CNSs, features offered with ordinary subscriber lines that end users may obtain from a carrier in order to receive an enhanced service.[122] Traditionally, CNSs are "locally tariffed, basic services that . . . give end uses access to the network for a variety of applications, not merely enhanced services."[123] The *BOC ONA Order* decided not to require full federal tariffing of CNSs.[124]

48. ADAPSO petitions for reconsideration of our decision not to order the federal tariffing of CNSs.[125] According to ADAPSO, federal tariffing of CNSs used in conjunction with federally tariffed BSEs would help satisfy the need for certainty in the regulatory environment when structural separation is lifted, would provide ESPs with the flexibility and rights inherent in the use of federal tariffs, and would provide BOCs with an incentive to apply cost-based pricing to new CNSs.[126] Several BOCs oppose this petition.[127]

49. ADAPSO has not presented any new arguments that persuade us to reconsider our decision not to require federal tariffing of CNSs. ADAPSO apparently would have us establish an unbundled federal tariff charge to be applied to CNSs when used by end users with interstate enhanced service calls. We could unbundle the interstate portion of CNS costs and establish a separate interstate CNS charge for end users, thereby requiring dual federal/state tariffing.[128] In these circumstances, the federal CNS tariff charge to the end user would be in addition to any state tariff charges. ADAPSO, however, appears to contemplate that federal tariffing of CNSs would eliminate state CNS tariff charges, which would not necessarily be the case. In this context, ADAPSO's petition for reconsideration does not present any compelling reason for us to interfere with existing state regulation of CNSs. We intend that the initiation of ONA, which involves both state and federal implementation, be as smooth a transition as possible. Considering the types of services within the CNS category, the significance for ESPs of the federal tariffing requirements we have already imposed, and the fact that CNSs are traditionally tariffed at the state level, we believe that continued state tariffing of CNSs would best effectuate federal ONA objectives.

2. ESP - Only Tariffs

50. The *BOC ONA Order* required BellSouth and SWBT to clarify and/or justify certain use restrictions, apparently in the form of "ESP-only" tariffs, that were part of their state tariffing plans.[129] ADAPSO asks that we summarily reject any ONA Plan that is predicated on the use of ESP-only tariffs, absent an unambiguous showing that such tariffs are affirmatively required by a specific state policy.[130] BellSouth and SWBT both subsequently amended their plans to remove any possible ESP-only tariffs,[131] thereby rendering moot the issues raised by ADAPSO.

3. State ONA Pricing

51. The *BOC ONA Order* found that none of the various provisions in the BOC state tariffing plans posed a fundamental threat to ONA objectives that would preclude ONA plan approval, with the single exception of that portion of the BellSouth plan denying ESPs the right to take existing services.[132] MCI's petition for reconsideration charges that BellSouth's approach to state pricing of ONA services facilitates cross-subsidization and discriminatory pricing. MCI states that BellSouth does not intend to consider costs in setting prices, but rather intends to establish a "market price" based upon its perception of what ESPs would be willing to pay for a particular service.[133]

52. MCI questions not the standard we applied to state tariffing plans in the *BOC ONA Order*, but rather the application of that standard to BellSouth's tariffing plans. Such issues are the subject of our companion *BOC ONA Amendment Order*. That order directs the BOCs to submit further information regarding their state tariffing plans by April 15, 1991.[134]

V. FEDERAL-STATE COOPERATION ON ONA MATTERS

53. One petitioner, California, asks that we clarify the amount of flexibility states retain under our ONA regime, while two others, ICA and CONAP, ask that before lifting structural separation, we crystallize the controls and/or monitoring we will use over state regulatory policies to harmonize them with our ONA objectives.[135]

54. California supports the cooperative efforts of the Section 410(b) Joint Conference and of the IILC, but seeks clarification that a state retains the flexibility to address issues under consideration by these bodies. It adds that a state needs to address these issues from the perspective of how a particular local telephone company may provide ONA services in a specific local market and tailor regulation accordingly.[136] CONAP states that we should not increase the states' flexibility, but rather manage that flexibility by placing appropriate constraints on the BOCs.[137] On the other hand, CONAP and ICA ask this Commission to take measures to ensure that state regulation does not contradict federal ONA policy.[138] CONAP faults the *BOC ONA Order* for deciding to lift structural separation without knowing whether state utility authority decisions may thwart ONA goals and without adopting any procedures that would alert this Commission or interested persons of such decisions or of state filings with similar potential.[139] A number of BOCs oppose the CONAP and ICA petitions.[140]

55. The Joint Conference was established as a "forum for the exchange of information" on important ONA issues of mutual state/federal concern.[141] It provides a "structure for a state/federal dialogue" in which a given jurisdiction may bring its particular concerns, with the aspiration, shared by all participants, of harmonizing divergent views and facilitating the advent of the Information Age in this country.[142] We observe that the Conference was designed to be flexible in nature, and has no specific limitations placed on the nature of its output.[143] The existence of the Joint Conference does not in any way detract from the states' legal authority to move forward on ONA-related matters within their jurisdiction.[144]

56. As an industry group "open to any party with a direct and material interest in the IILC processes and activities," the IILC generally operates by consensus.[145] Consensus resolutions do not bind participants[146] and of course, being the product of a non-governmental group, do not bind any regulatory authorities.

57. Contrary to CONAP's suggestion that we have "fail[ed] to grapple adequately with intrastate issues."[147] we are presently engaged in dialogue with the states on these very issues in the Joint Conference, and have reviewed the BOCs' state tariffing plans and required further information in the *BOC ONA Amendment Order*. We believe that it would be both premature and counterproductive to suggest, as CONAP advocates, [148] what remedy we might take if a state requirement or tariff filing were inconsistent with ONA objectives. We remain convinced that state-federal coordination is essential to the long-term viability of ONA. We have established procedures permitting us to monitor adequately the BOCs' commitment to ONA implementation. In addition to the continuing Joint Conference process, our companion *BOC ONA Amendment Order* requires the BOCs to update their descriptions of their state tariffs, along with illustrative tariffs.[149] The *BOC ONA Amendment Order* also expressly provides for continuing oversight of ONA implementation and reviews our numerous enforcement powers.[150] We will also provide a central source of state tariff information for ESPs as well as regulators in the Tariff Division of the Common Carrier Bureau, which will compile a log of state tariff filing updates.

58. California, with the support of MCI, asks this Commission to convene a Joint Board now to consider jurisdictional separations issues raised by ONA.[151] California states that such a Joint Board should address the need for revisions to the separations rules to accommodate the possibly large investment in new network technologies that might be used only for service in either the state or in the federal jurisdiction.[152] MCI states that it would also be appropriate, while the Part 69 Rule Making is pending, for a Joint Board to consider applying separations procedures to develop subelements for pricing purposes under Part 69.[153] NYNEX and Ameritech oppose California's requests.[154]

59. The *BOC ONA Order* observed that it was not clear that implementation of ONA would have a substantial impact on separations allocations.[155] The pleadings before us present no information on this subject. The Section 410 (b) Joint Conference, however, has compiled various data on the possible separations effects of ONA, and found that current and near-term investment in the new technologies identified by California is relatively small, while asking the existing Federal/State Joint Board in CC Docket 80-286 to take cognizance of this information in the course of their consideration of related issues curently before that Joint Board. In these circumstances, there is no basis for reconsideration.[156]

VI. DEPLOYMENT AND EVOLUTION OF ONA SERVICES

A. Deployment of ONA Services

60. Petitioners CONAP and ICA are seeking two primary objectives relating to the deployment of ONA services: (a) that deployment schedules for all BOCs be announced on a market-area-wide basis, and (b) more importantly, that deployment itself occur on a market-area-wide basis rather than only at selected central offices within a market area. They argue that subscribers generally will not have sufficient demand to order service economically on a central office basis.[157] CONAP further claims that the BOCs can use central-office-by-central-office deployment to gain a competitive advantage for their enhanced service affiliates "under the guise of technological considerations."[158] In addition, CONAP would have us require that the BOCs employ a specific technology -- adjunct processors -- in metropolitan area tandems and selected central offices in order to achieve such ubiquity within these market areas.[159]

61. We conclude that the Commission's other orders provide sufficiently for consideration of the deployment of ONA services on a market area basis. The *BOC ONA Order* specifically required the BOCs to file ONA Plan amendments containing deployment schedules that indicate the percentage of access lines served in each of its *geographic market areas* for the 1990- 1992 time period.[160] In our companion *BOC ONA Amendment Order*, we find that each BOC has provided schedules showing deployment system-wide and in specific market areas, and that each BOC has clearly delineated the boundaries of each of its designated market areas.[161]

62. We also conclude that our previous orders and the companion *BOC ONA Amendment Order* substantially address petitioners' concerns about ubiquitous deployment of ONA services. To the extent that petitioners seek the eventual achievement of ubiquitous deployment, we share that goal. We find, however, that an evolutionary approach to the attainment of ubiquity is in the public interest. The *Phase I Order* set forth the criteria that govern whether a BOC must provide a given ONA service or feature. These are not intended to mandate a "flash cut" to full deployment.[162] In order to ensure an evolutionary progression of ONA deployment, however, we do require the BOCs to file deployment schedules, including annual updates;[163] to respond to ESP requests for ONA services and features within a specified period of time; and to list these service requests and report on their disposition.[164] ESPs dissatisfied with a BOC response to a particular request may seek redress from this Commission.[165] We also require the BOCs to report on steps they have taken to offer services previously deemed technically infeasible. We also reiterate the caution that if a given BOC's actual implementation does not reflect the approved schedules, we will "consider imposing sanctions, including the reimposition of structural separation on the offending carrier."[166] We believe these requirements provide a check on the validity of any BOC claims of a lack of demand for particular ONA services and features, and on the ability of the BOCs to abuse the technical feasibility criteria for the deployment of ONA services and features, as feared by CONAP.

63. We decline to impose a rigid requirement of immediate ubiquitous, or nearly ubiquitous, deployment of an ONA service in a given market area. Ensuring nationwide availability of enhanced services, as we have stated,[167] is an important goal but here, a sound balance among various considerations must be struck. Rigidly requiring ubiquitous deployment would inhibit a BOC from deploying an ONA service or feature in a given area when partial deployment might allow significantly earlier provision of enhanced services to consumers on a commercially viable basis.[168] In addition, as noted by Bell

Atlantic and BellSouth, market-area-wide deployment should not be required if demand is insufficient across the entire market area or broad deployment is not technically feasible.

64. CONAP also asks us to mandate the use of adjunct processors.[169] In light of the evolutionary character of ONA, we decline to mandate, at this early stage of ONA development, use of a particular technology, such as adjunct processors. It is not at all clear from this record that the CONAP proposal represents a technically and economically feasible method for providing ONA services and features across a broad geographic area. We believe that a phased approach to achievement of ubiquity, permitting room for innovation and network development by the BOCS, together with our monitoring mechanisms described above, represent a preferable and more prudent course of action.

B. ONA Evolution and Future ONA Services

65. The *BOC ONA Order* concluded that the BOCs did not, in general, adequately address how new network technologies would be used to offer ONA services, and therefore required each BOC to describe in its amended plan the ONA services it now views as being technically feasible under CCS7, ISDN, and Intelligent Network technologies.[170]

66. The EDS petition asks this Commission to classify ISDN D-channel access as a BSE and to require nondiscriminatory provision of that access under ONA.[171] When ISDN is implemented, the BOCs will be able to use the D-channel directly in the provision of their protocol processing services. Because of technological constraints, however, Value Added Networks (VANs) may not be able to access end users directly via an ISDN D-channel in the same manner as the BOCs.[172] EDS contends that access to the ISDN D-channel by ESPs is technically feasible, that such access is necessary for viable competition, and that granting its petition would allow ESPs to plan for future services under the assumption that D-channel access will be available when ISDN is implemented in a given area.[173]

67. We deny EDS' request on reconsideration because we believe it is premature. Contrary to EDS' assertions, it is not yet clear what arrangements for D-channel access may be technically feasible. At the present time, the BOCs and the ESPs are actively developing, within the IILC process, possible solutions for providing D-channel access to ESPs.[174] In the absence of specific information about the technical options for D-channel access, we decline to mandate ISDN D-channel access or to rule on the regulatory status of this service, *i.e.*, whether it is a BSE. In addition, because widespread implementation of ISDN still appears not to be likely in the near term, and because ESPs do not have concrete information about the price of any feasible D-channel access, we do not believe that granting the reconsideration request is likely to help ESP planning for future services significantly.

68. As Bell Atlantic notes in its opposition, ISDN D-channel access is also at issue in the amended BOC ONA Plans. Our companion *BOC ONA Amendment Order* directs the BOCs to report on the progress achieved in the IILC process on the ISDN D-channel access question. We will carefully scrutinize their amended plans to ensure that those plans are in full compliance with any applicable ONA obligations.[175]

VII. COLLOCATION

69. The *Phase I Order* declined to mandate that the BOCs provide collocation opportunities to ESPs.[176] In the subsequent reconsiderations of the *Phase I Order*, no parties questioned that decision. In commenting on the BOCs' ONA plans, however, some parties did ask us to reconsider our collocation decision. The *BOC ONA Order* declined to reconsider the Commission's collocation policies "[i]n light of the extensive attention that we devoted to the collocation issue in the *Computer III* proceeding."[177]

70. ADAPSO asks that the BOCs be required to justify their decisions not to offer collocation after specific requests by ESPs, just as the *Phase I Reconsideration* requires the BOCs to justify decisions not to satisfy any BSE request in accordance with the *Computer III* feasibility criteria.[178] ADAPSO argues that although the *Phase I Order* does not require mandatory collocation, it does not "in any way prohibit the use of collocation as a means of providing enhanced service providers with equal access to the network [under an appropriate BSE tariff]."[179]

71. In opposition, Ameritech, Bell Atlantic, BellSouth, Pacific, SWBT, and US West variously claim that: (a) collocation is not a BSE; (b) the collocation issue has been resolved in previous proceedings; and (c) no new arguments in support of mandatory collocation have been made.[180] In asserting that collocation is not a basic service, Bell Atlantic states that "[t]he same [ONA] services will be available to the ESPs, at the same prices, whether or not collocation is required."[181]

72. We deny ADAPSO's request, which, despite ADAPSO's representations, runs contrary to the Commission's *Phase I Order* decision not to require the BOCs to provide collocation. The Commission reached that decision after balancing the possible benefits (including lower ESP transport charges) and the possible disadvantages (including increased BOC operational costs, security and space concerns, and the possible chilling effect on the development of future network architectures that might provide more efficient CEI solutions). Although ADAPSO contends that it is not seeking reconsideration of that decision, ADAPSO's alternative framework for deciding when a BOC would have to offer mandatory collocation is fundamentally inconsistent with the *Phase I Order* analysis. ADAPSO's decisional criteria would render irrelevant the considerations the Commission expressed concerning the inadvisability of mandatory collocation. Instead, ADAPSO would have us require a BOC to provide collocation whenever the four BSE feasibility criteria were satisfied --sufficient market demand and ESP-perceived utility, and technical and cost feasibility. In addition, we decline to burden the BOCs with a requirement that they justify a decision not to offer collocation on an individual case basis every time an ESP makes a request. Finally, we believe that requiring the BOCs to respond in this fashion would, contrary to our *Phase I Order* policies, tend to inhibit development of more efficient forms of CEI.[182] ADAPSO's request constitutes, at bottom, an untimely petition for reconsideration of our *Phase I Order* determination not to require mandatory collocation. The question was decided before the *BOC ONA Order* and accordingly is not a proper subject for reconsideration.

VIII. OTHER NONSTRUCTURAL SAFEGUARDS

A. Installation and Maintenance Reports

73. The *BOC ONA Order* required each BOC to amend its plan for filing nondiscrimination reports on installation and maintenance of ONA services to report on each ONA service, including each BSA, BSE, and CNS, that its enhanced services operation purchases to provide enhanced services.[183] Those reports were to compare the timing of services provided to the BOC's own enhanced services operations against a sampling of all customers. Each BOC was required to include information on total orders, due dates missed and average intervals for each service category reported.

74. The BOCs request this Commission to modify the installation and maintenance reports, primarily to eliminate the obligation to report separately on BSEs and CNSs.[184] Supported by Ameritech, the NYNEX petition for reconsideration requests that we require reporting only at the BSA level, which, it contends, is sufficiently detailed to meet the Commission's nondiscrimination goals.[185] In the alternative, NYNEX suggests reporting by service categories within BSAs.[186] The remaining five BOCs filed a joint petition (Joint BOC Petition) requesting that the Commission modify the reporting requirement to allow the BOCs to report by "service codes."[187] The Joint BOC Petition also requests that we delete the reporting requirements for average service interval for installation, and for due dates missed for the maintenance of "designed" circuits.

75. CONAP and MCI oppose the NYNEX and Joint BOC Petitions.[188] CONAP argues that the BOCs do not adequately describe the difficulty of modifying their existing systems to comply with the Commission's requirements, or the costs of doing so. CONAP describes the BOCs' petitions as an attempt to erode ONA protections.[189] MCI argues that the BOC petitions present two problems: (1) regulators may need different information to identify discrimination from that currently collected by BOC personnel in installation and maintenance activities; and (2) the BOCs provide limited information about their current procedures, making it impossible to determine whether their proposed alternative approach would be sufficient to identify discrimination. MCI also argues that the inconsistencies and ambiguities in the BOCs' definition of service codes and categories make it impossible to determine whether the Commission's reporting requirement is appropriate or whether the BOCs present a viable alternative.[190]

76. We conclude, on the basis of this record and the record relating to the *BOC ONA Amendment Order*, that we should modify the installation and maintenance reporting requirements set forth in the *BOC ONA Order*. The record shows that the BOCs' current installation and maintenance systems do not track information at the BSE and CNS level.[191] After a detailed review of the information collected in the BOCs' installation and tracking systems, we conclude that, in order to provide BSE and CNS-level information, the BOCs would have to make major revisions in their installation and maintenance systems, including the information collected and the software used to track and report the information. Requiring individual orders for each separate element in a customer installation order would substantially increase administrative costs.[192] Similarly, the BOCs do not currently code or maintain information in their maintenance reporting system about the BSE or CNS under repair.[193] In addition, the utility of disaggregating the information we require to the BSE and CNS level may be minimal in a number of cases. As the BOCs state, they currently track a service order placed by a customer -- which can, for example, include one BSA and several BSEs -- as one service order, with one installation date. That installation date is the latest that all the elements of the service order -- BSAs and BSEs -- are to be operational. In many cases, such aggregation tracks the technical constraints on service availability. A BSE such as hunting, for example, could not be activated without an underlying BSA to associate with it.

77. Reporting at the BSA-only level, as suggested by NYNEX, is not sufficiently detailed, however, to provide sufficient safeguards against any potential discrimination on the part of BOCs. In addition, we believe that achieving more uniformity in these reports would increase their utility by permitting us to compare the relative performances of different BOCs. We are therefore requiring the BOCs to report on installation and maintenance for the standard categories and format set forth in Appendix B to this order.[194] We believe that this level of detail and this more standardized format will provide us with an important means of detecting any potential discrimination toward classes of users using these specific services, and will avoid unnecessary administrative costs by being based generally on the existing service codes tracked by the BOCs.

78. We are also modifying our requirements to mandate that the BOCs report all the categories listed in Appendix B for all services they provide, whether or not their enhanced services operations purchase these services. This will enable us to identify discrepencies in installation and maintenance procedures for services provided to the BOC enhanced services operation as compared with services provided to all other customers. It will also avoid the potential gaps caused by reporting only those categories used by the BOCs' enhanced service operations. Independent ESP operations that purchase services not used by BOC enhanced service operations will now be reflected in the reports.[195]

79. We decline to modify the *BOC ONA Order*'s requirement that the BOCs report average intervals for installation and maintenance activities. The Joint BOC Petition argues that the average interval reporting requirement for installation reporting will not provide useful information because customers often ask for specific installation dates based on the customers' business needs, and because service intervals vary by the number of services requested on each service order.[196] Even assuming those contentions to be true, the BOCs give no reason to expect that those factors would affect the provision of installation and maintenance to their enhanced services operations and to other customers differently, making comparisons invalid. We believe that average intervals provide some check on the possibility of discrimination in the assignment of due dates.

80. The *BOC ONA Order* required the BOCs to report due dates missed by service category for installation and maintenance.[197] For maintenance of services designed specially for a customer (designed services), the Joint BOC Petition argues that customers generally are not given a time for the trouble to be cleared, so reporting due dates missed "has no relevance."[198] Some BOCs indicate that although they currently quote a standard interval to a customer of a nondesigned system that needs repair, they

do not currently provide an estimated time of repair for designed systems. The *BOC ONA Order* stated that " [i]f a BOC does not establish a firm due date for a particular repair problem, the BOCs need only report the average maintenance interval for that item.[199] Thus, BOCs do not have to report due dates missed for maintenance on designed systems for which they do not provide an estimate of time of completion.[200]

B. Use of Customer Proprietary Network Information (CPNI)

81. The *Phase II Order* declined to impose on the BOCs a "prior authorization" rule for BOC use of CPNI, finding that such a requirement is unnecessary to protect customer interests and promote competition.[201] Thus, a customer need not expressly authorize release of its CPNI to BOC enhanced services personnel for such personnel to make use of this information, although a customer can request that such information be withheld. On the other hand, a customer must sign an authorization to release its CPNI to an ESP outside the BOC. Dun & Bradstreet here requests that the Commission revise the CPNI rules so that the BOCs would not receive "preferential" access. Dun & Bradstreet cites two changed circumstances justifying reconsideration: first, the Commission has not previously considered the value of CPNI as "content" rather than just as a marketing tool, and second, the BOC ONA plans demonstrate that the CPNI rules permit the BOCs to act anticompetitively in ways the Commission had not previously considered.[202] Most BOCs oppose this petition.[203]

82. Our CPNI rules are not properly before us at this time. The Commission adopted the CPNI rules for enhanced services in the *Phase II Order* in the *Computer III* proceeding, following the CPNI rules adopted in the CPE context.[204] Reconsideration and further reconsideration of those rules were sought and denied.[205] The ONA proceeding concerns the BOCs' implementation of those rules and not a revisitation of their wisdom. Therefore, we agree with those parties contending that it is procedurally inappropriate to object to the "prior authorization rule" in this reconsideration of the *BOC ONA Order*. [206]

83. We appreciate, however, the continued concern of some of the BOCs' ESP competitors with the current CPNI rules. While those rules are not a proper subject for reconsideration in this proceeding, we believe that the BOCs' implementation of those rules must evidence a good faith effort to address any legitimate concerns of their ESP competitors on this issue. The manner in which these rules are implemented can affect whether a customer purchases BOC enhanced services before it is aware either that independent enhanced service providers exist or that those providers can make use of whatever benefits that CPNI provides in structuring a service offering for that customer's needs. We therefore are requiring that the BOC plans for implementing our CPNI requirements take into account issues of informed customer choice and competitive equity, and that the amended ONA plans that the BOCs file in April 1991 contain proposed solutions to these issues.

IX. THE IILC

84. The *BOC ONA Order* approved of the BOCs' use of the Information Industry Liaison Committee (IILC), which had been established by the Exchange Carrier Standards Association (ECSA) in 1987 to obtain continuing industry input on ONA implementation.[207] We declined, however, to take a formal active role in the mediation of any differences that might arise between IILC participants, which include not only the BOCs and the independent ESPs, but a number of other parties interested in ONA implementation. We decided, instead, to send FCC staff to IILC meetings in order to monitor the progress of the IILC in resolving ONA issues.[208] We also ordered the BOCs to address, within the IILC process, several specific issues pertaining to the implementation of ONA,[209] and to report on the status of these efforts in the ONA plan amendments filed on May 19, 1989.

85. Three parties seek reconsideration of those decisions. ADAPSO, for instance, urges us to require the IILC to develop public timetables for the consideration of each of the issues referred by the Commission to the IILC.[210] EDS recommends that our IILC observer be directed to submit periodic reports, at no less than quarterly intervals, with regard to the development and deployment of CCS7, ISDN, and the Intelligent Network in order to help speed deployment of these new technologies.[211] The ONA Users Group requests that the Commission take a more active role in the IILC, expressing concern about BOC incentives once their ONA Plans are approved. [212]

86. Three BOCs oppose these requests.[213] SWBT, for instance, opposes the imposition of timetables for the resolution of disputes, contending that the IILC process is working well and, moreover, that the setting of uniformity standards does not lend itself to the imposition of strict timetables. SWBT also argues that the attendance of a Commission representative at IILC meetings obviates the need for quarterly progress reports.

87. The concerns raised on reconsideration were also raised, often in considerably more detail, in the record filed on the BOC ONA Plan Amendments. We address those concerns in our companion *BOC ONA Amendment Order*, declining to prescribe periodic progress reporting or to mandate a Commission role in the resolution of complaints or the setting of implementation timetables. The *BOC ONA Amendment Order* does, however, require the BOCs to submit a report, in the form of an ONA plan amendment on April 15, 1991 reflecting the steps the BOCs have taken to implement IILC recommendations.[214] We hereby deny the petitions for reconsideration on the IILC issues for the reasons given in our companion *BOC ONA Amendment Order*. [215]

X. ORDERING CLAUSE

88. IT IS HEREBY ORDERED, that pursuant to 47 U.S.C. §§151, 154(i) and (j), 201, 202, 203, 218, 303(r), and 405, and 5 U.S.C. §553, the petitions for reconsideration, partial reconsideration and/or clarification filed in this proceeding ARE DENIED, except as provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Petitions for Reconsideration and/or Clarification

Association of Data Processing Service Organizations (ADAPSO), Petition for Partial Reconsideration, Feb. 24, 1989 (ADAPSO Petition)

Bell Atlantic Companies, the operating telephone companies of BellSouth Corporation, Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell, US West, Inc. (BOCs), Petition for Partial Reconsideration, Feb. 24, 1989 (BOC Joint Petition)

People of the State of California and the Public Utilities Commission of the State of California (California), Petition for Clarification and Reconsideration, Feb. 24, 1989 (California Petition)

Coalition of Open Network Architecture Parties (CONAP), Motion to Accept Late Filed Petition, Petition for Partial Reconsideration, Feb. 27, 1989 (CONAP Petition)

Dun and Bradstreet Corporation (Dun & Bradstreet), Petition for Partial Reconsideration, Feb. 24, 1989 (Dun & Bradstreet Petition)

Electronic Data Systems Corporation (EDS), Petition for Reconsideration and Clarification, Feb. 24, 1989 (EDS Petition)

International Communications Association (ICA), Petition for Partial Reconsideration, Feb. 24, 1989 (ICA Petition)

MCI Telecommunications Corporation (MCI), Petition for Reconsideration of MCI Telecommunications Corporation, Feb. 24, 1989 (MCI Petition)

New York Clearing House Association, California Bankers Clearing House Association and Committee of Corporate Telecommunications Users (ONA Users Group), Petition for Partial Reconsideration by the New York Clearing House Association, California Bankers Clearing House Association and Committee of Corporate Telecommunications Users, Feb. 24, 1989 (ONA Users Group Petition)

New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Petition for Clarification, Feb. 24, 1989 (NYNEX Petition)

Pacific Bell and Nevada Bell (Pactel), Petition for Reconsideration, Feb. 23, 1989 (Pactel Petition)

Parties Filing Oppositions or Comments

ADAPSO, Opposition of ADAPSO, April 5, 1989 (ADAPSO Opposition)

American Telephone and Telegraph Company (AT&T), AT&T's Opposition to Pacific's Petition for Reconsideration, April 5, 1989 (AT&T Opposition)

Ameritech Operating Companies (Ameritech), Comments of the Ameritech Operating Companies Regarding Petitions for Reconsideration and Clarification, April 5, 1989 (Ameritech Comments)

American Petroleum Institute (API), Statement in Support of and Opposition to Petitions for Reconsideration, April 5, 1989 (API Comments)

Association of Telemessaging Services International, Inc. (ATSI), Comments of the Association of Telemessaging Services International, Inc., April 5, 1989 (ATSI Comments)

Parties Filing Oppositions or Comments (cont.)

Bell Atlantic Telephone Companies (Bell Atlantic), Opposition of Bell Atlantic to Petitions for Reconsideration, April 5, 1989 (Bell Atlantic Opposition)

BellSouth Corporation (BellSouth), BellSouth's Comments in Support of and in Opposition to Petitions for Reconsideration, April 5, 1989 (BellSouth Comments)

CONAP, Opposition to Petitions for Clarification and/or Reconsideration, April 5, 1989 (CONAP Opposition)

MCI, Comments and Opposition of MCI Telecommunications Corporation, April 5, 1989 (MCI Comments)

NYNEX, Opposition of the NYNEX Telephone Companies to Petitions for Reconsideration, April 5, 1989 (NYNEX Opposition)

ONA Users Group, Opposition of the California Bankers Clearing House Association, The Committee of Corporate Telecommunications Users and the New York Clearing House Association to Pacific Bell's and Nevada Bell's Petition for Reconsideration, April 5, 1989 (ONA Users Group Opposition)

Pactel, Opposition to Certain Petitions for Reconsideration, April 5, 1989 (Pactel Opposition)

Southwestern Bell Telephone Company (SWBT), Southwestern Bell Telephone Company's Opposition to Petitions for Reconsideration, April 5, 1989 (SWBT Opposition)

Tele-Communications Association (TCA), Opposition to Petition for Reconsideration, April 5, 1989 (TCA Opposition)

US West Inc. (US West), Opposition to Petitions for Reconsideration, April 5, 1989 (US West Opposition)

Parties Filing Replies

ADAPSO, Reply of ADAPSO, April 19, 1989 (ADAPSO Reply)

ADT Security Systems, Inc. (ADT), Reply, April 17, 1989 (ADT Reply)

American Newspaper Publishers Association (ANPA), Reply of the American Newspaper Publishers Association, April 19, 1989 (ANPA Reply)

Ameritech, Reply Comments of the Ameritech Operating Companies Regarding Petitions for Reconsideration and Clarification, April 20, 1989 (Ameritech Reply)

Bell Atlantic, Reply of the Bell Atlantic Telephone Companies, April 20, 1989 (Bell Atlantic Reply)

BellSouth, BellSouth's Reply Comments on Petitions for Reconsideration, April 20, 1989 (BellSouth Reply)

California, Reply to Oppositions to Petition for Clarification and Reconsideration, April 19, 1989 (California Reply)

CONAP, Reply to Oppositions to Petition for Partial Reconsideration, April 19, 1989 (CONAP Reply)

Dun & Bradstreet, Reply of the Dun and Bradstreet Corporation, April 19, 1989 (Dun & Bradstreet Reply)

EDS, Reply of Electronic Data Systems Corporation, April 19, 1989 (EDS Reply)

Parties Filing Replies (cont.)

MCI, Reply Comments of MCI Telecommunications Corporation, April 19, 1989 (MCI Reply)

ONA Users Group, Reply Comments of the California Bankers Clearing House Association, the Committee of Corporate Telecommunications Users and New York Clearing House Association, April 20, 1989 (ONA Users Group Reply)

Pactel, Reply of Pacific Bell and Nevada Bell to Oppositions to Petitions for Reconsideration, April 19, 1989 (Pactel Reply)

SWBT, Southwestern Bell Telephone Company's Reply to Oppositions to Petition for Partial Reconsideration, April 20, 1989 (SWBT Reply)

US West, Reply of US West, Inc., April 20, 1989 (US West Reply)

APPENDIX B

BOC ONA NONDISCRIMINATION INSTALLATION AND MAINTENANCE REPORTING

A. Requirements

Those BOCs unable to report on their installation and maintenance activities immediately pursuant to the 49 categories listed in Section B herein, must make the necessary changes to comply in the first quarterly report submitted more than one year after the release of this Order. From that time on, they are to report quarterly pursuant to the format described herein. In the interim, the BOCs shall continue to report according to the requirements set out in their CEI plans.

Since the following list of categories may change over time because of the addition of new services, we require the BOCs to provide at the same time as their annual ONA deployment updates, any recommendations for revisions to the reporting categories. We recognize that not all BOCs are providing services within all categories in Section B. If a BOC is not providing any services within a given category, it will not have any information to report for that category.

B. Service Categories

Circuit Switched Line-Business line, PBX, Centrex, WATS, Mobile, Feature Group A, Foreign Exchange.

Circuit Switched Trunk-Feature Group B, Feature Group D, DID (Line and Trunk)

Packet Switched Services (X.25 and X.75)- Packet DDD Access Line, Packet Synchronous Access Line, Packet Asynchronous Access Line

Dedicated Metallic-Protection Alarm, Protection Relaying, Control Circuit

Dedicated Telegraph Grade-Telegraph Grade 75 Baud, Telegraph 150 Baud

Dedicated Voice Grade-Voice:Non-Switched Line, Voice Switched Line, Voice Switched Trunk, Voice and Tone - Radio Land Line, Data Low Speed, Basic Data and Voice, Voice and Data-PSN Access Tie Trunk, Voice and Data-SSN Access, Voice and Data-SSN-Intermachine Trunk, Data Extension-Voice Grade Data, Protection Relay Voice Grade, Telephoto and Facsimile

Dedicated Program Audio-Program Audio 200-3500 HZ, Program Audio 100-5000 HZ, Program Audio 50-8000 HZ, Program Audio 50-15000 HZ

Dedicated Video-TV Channel-One Way 15kHz Audio, TV Channel-One Way 5 kHz Audio

Dedicated Digital - Digital Voice Circuit, Digital Data-2.4kb/s, Digital Data-4.8kb/s, Digital Data-9.6kb/s, Digital Digital Data-56kb/s

Dedicated High Capacity Digital- 1.544 MBPS BSA

Dedicated High Capacity Digital (Greater than 1.544 MBPS)-Dedicated Digital-3.152 MBPS, Dedicated Digital-6.312 MBPS, Dedicated Digital-44.736 MBPS, Dedicated Digital- 45 MBPS.or Higher

Dedicated Alert Transport

Dedicated Derived Channel

Dedicated Network Access Link (DNAL)

B. Installation Reporting Format

(Separately for BOC affiliated ESP operations and all others)

Service Category (see B above)	Total Orders	Due Dates Missed	Percent Due Dates Missed	Average Interval[216]

C. Maintenance Reporting Format

(Separately for BOC affiliated ESP operations and all others)

Maintenance Activities With Due Dates

Service Category CC2>Total (see B above)	Orders	Due Dates Missed	Percent Due Dates Missed	Average Interval Interval

Maintenance Activities Without Due Dates

Service Category (see B above)	Total Orders	Average Interval

FOOTNOTES

[1] Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988) (*BOC ONA Order*).

[2] Parties filing oppositions and replies are listed in Appendix A. We use the abbreviations listed in that appendix throughout this order.

[3] Memorandum Opinion and Order, Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, FCC No. 90-135 (released May 8, 1990) (*BOCONA Amendment Order*).

[4] Amendment of Sections 64.702 of the Commission's Rules and Regulations (*Third Computer Inquiry*), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and *sub nom. Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration*), *further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration*), *appeal pending sub nom. California v. FCC*, No. 88-7183 (9th Cir.) (pet. for rev. filed May 16, 1988).

[5] *BOC ONA Order*, 4 FCC Rcd at 143, para. 276. We did not require federal tariffing of CNSs. *Id.* at 145-46, para. 280.

[6] The Commission subsequently initiated such a proceeding. Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 4 FCC Rcd 3983 (1989) (*Part 69 Rule Making*).

[7] *BOC ONA Order*, 4 FCC Rcd at 162-171, paras. 309-325. Our actions ensured that ESPs would be able to continue taking local business lines or other state tariffed access arrangements.

[8] *Id.* at 188-191, paras. 357-64.

[9] *Id.* at 204, para. 389.

[10] *Id.* at 201-202, paras. 382-83.

[11] For additional background information see *id.* at 10-23, paras. 1-29.

[12] *Phase I Order*, 104 FCC 2d at 1065, para. 216.

[13] *BOC ONA Order*, 4 FCC Rcd at 42, paras. 70-71.

[14] *Id.* at 41-43, paras. 69-72. For a description of the ONA model, see *id.* paras. 56-58.

[15] ONA Users Group Petition at 8-12; ONA Users Group Reply at 5-9. *See also* MCI Petition at 7-10.

[16] ICA Petition at 3-4; API Comments at 3-4; CONAP Petition at 4-5. CONAP accompanied its Petition with a Motion to Accept Late-Filed Pleading. In light of the extraordinary circumstances alleged, we hereby grant CONAP's motion. *See generally* Meredith Corp. v. FCC, 809 F. 2d 863 (D.C. Cir. 1987); Gardner v. FCC, 530 F. 2d 1086 (D.C. Cir. 1976); Greater Boston Television Corp. v. FCC, 463 F. 2d 268, 283 (D.C. Cir. 1970, *cert. denied sub nom.*, WHDH v. FCC, 403 U.S. 923 (1971).

[17] MCI Petition at 2-4, 7-13, MCI Reply at 2-3, 5; Dun & Bradstreet Petition at 1-2, Dun & Bradstreet Reply at 1-2; CONAP Petition at i-ii, 1-8, CONAP Reply at 2-3; ADAPSO Petition at 2-3.

[18] *See, e.g.*, CONAP Petition at i-ii, CONAP Reply at 1-2; ADAPSO Petition at 2-3.

[19] ADAPSO Petition at 3.

[20] *Phase I Reconsideration*, 2 FCC Rcd at 3055, para. 142.

[21] *See supra* note 12 and accompanying text.

[22] *Phase I Order*, 104 FCC 2d at 1054-55, para. 190.

[23] *BOC ONA Order*, 4 FCC Rcd at 42, para. 70. Thus, we do not agree with parties that contend that the ONA model results in rebundling or greater bundling of network elements than under existing tariffs. We also believe that requiring more radical unbundling immediately could well be costly, would involve technical and operational difficulties, and could raise issues regarding competition in the provision of local basic service and universal service. *See id.* at 42, paras. 70-71. Contrary to some parties' claims, the record upon which we based this analysis was extensive. CONAP Petition at 5; *BOC ONA Order*, 4 FCC Rcd at 38-41, paras. 62-68.

[24] *BOC ONA Amendment Order*, n. 26.

[25] NYNEX Opposition at 19.

[26] *BOC ONA Order*, 4 FCC Rcd at 43, para. 72.

[27] *BOC ONA Amendment Order*, para. 97.

[28] *Id.*, para. 110.

[29] *Id.*, para. 19.

[30] Our use of the ONA model does not, of course, preclude further unbundling. ESPs remain free to identify and request specific unbundled functionalities of a BOC. *Cf.* NYNEX Opposition at 4-5 (petitioners have failed to identify any specific unbundled services which they requested of NYNEX and which NYNEX refused to offer). BOC responses to such requests are subject to specific ONA obligations. *BOC ONA Order*, 4 FCC Rcd at 207-08, paras. 396-97. In addition, we have not preempted the states from requiring further unbundling of intrastate ONA services.

[31] API Comments at 5.

[32] *BOC ONA Order*, 4 FCC Rcd at 45, 48, paras. 78, 85.

[33] *See generally infra* para. 35, Section IVB (discussion of interstate tariffing requirement). *See also BOC ONA Amendment Order*, paras. 79-88.

[34] SWBT Opposition at 6-7.

[35] Indeed, the BOCs generally forgo the "short wire" advantage that they enjoy by virtue of collocation, and pay tariffed rates for lines that they do not in fact use under the "price parity" rule applicable to the minimization of transport costs requirement. *BOC ONA Order*, 4 FCC Rcd at 86-89, paras. 166-72.

[36] MCI also objects that ONA does nothing to prevent discrimination and cross subsidization because the same BOC personnel are responsible for the development of BOC enhanced services and for responding to ESP requests, and because the BOC enhanced service personnel do not have to go through the same procedures as independent ESPs when requesting new network services. MCI Petition at 15-20. These arguments raise issues decided in the *Computer III* proceeding and are inappropriately raised in seeking reconsideration of the *BOC ONA Order, Phase I Order*, 104 FCC 2d at 1068, paras. 221-222, at 1080-86, paras. 246-255.

[37] *See, e.g.*, ADAPSO Petition at ii, 3-8; API Comments at ii, 3-6; ICA Petition at 3-4.

[38] ADAPSO Petition at 5-6; ADAPSO Reply at 2.

[39] ADAPSO Petition at 5; API Comments at 5-6.

[40] ADAPSO Petition at 6-7. ADAPSO argues that bundling BSAs and BSEs will prevent ESPs from using BSEs with existing access arrangements unless these are classified as BSAs. The model creates an incentive to develop more expensive BSAs to replace existing access arrangements, thus creating the equivalent of ESP-only tariffs, according to ADAPSO. ADAPSO Reply at 2 & n. 6. *See also* API Comments at 5.

[41] ADAPSO Reply at 2.

[42] API Comments at ii, 6.

[43] API Comments at 6.

[44] To the extent that API is seeking to be able to "mix and match" state and federal ONA services, we note that the Commission has decided not to adopt that approach. *Part 69 Rulemaking, supra* note 6, 4 FCC Rcd at 3989, para. 43.

[45] Bell Atlantic Opposition at 2.

[46] *Part 69 Rulemaking, supra* note 6.

[47] *BOC ONA Amendment Order*, para. 88.

[48] *BOC ONA Order*, 4 FCC Rcd at 59-60, para. 110. The term "OSS" was defined to include diagnostic, maintenance and network management capabilities that many ESPs claim are needed to control their telecommunications services efficiently. *Id.* at 51 n. 167.

[49] ADAPSO Petition at 12, 13, 15; EDS Petition at 7-11 & n.17.

[50] EDS Reply at 5-6.

[51] Ameritech Comments at 12; Bell Atlantic Opposition at 5-6; BellSouth Comments at 5-6; Pactel Opposition at 14-15; NYNEX Opposition at 9-10; SWBT Opposition at 15-17.

[52] BellSouth Comments at 5-6.

[53] Pactel Opposition at 14-15.

[54] NYNEX Opposition at 9-10.

[55] SWBT Opposition at 16-17.

[56] We decline, contrary to the suggestions of some commenters, to classify as ONA services all OSS capabilities, which include many internal administrative systems necessary to operation of the BOCs' network, in the absence of demonstrated relevance to ESP service needs and of evidence that such services are basic, or adjunct to basic, network offerings. *See, e.g.*, Reply of the Information Industry Association (dated Aug. 11, 1989) at 6 (IIA BOC ONA Amendment Reply) at 6.

[57] Some ESPs desire to speed up and automate the service order process by placing service orders electronically and by being able to determine electronically the status of service orders. *See, e.g.*, Letter from Stephen R. Bell, Squire, Sanders & Dempsey, to Donna R. Searcy, Secretary, FCC (dated Mar. 23, 1990) Attachment at 2 (Tymnet Ex Parte Letter). *See also* Letter from Warner Sinback, Chairman Domestic Communications Committee, ADAPSO, to Regina Harrison, Common Carrier Bureau, FCC (dated March 7, 1990) at 5 (ADAPSO Ex Parte Letter).

[58] Some ESPs seek access to features that will allow them to enter a trouble report into a BOC database and subsequently check its status. Tymnet Ex Parte Letter, *supra note 57, at 2; ADAPSO Ex Parte Letter, supra* note 57, at 5.

[59] *See, e.g.*, ADAPSO Petition at 12; Tymnet Ex Parte Letter, *supra* note 57 (listing testing and reconfiguration ability as desired offerings). *See also* comments of Electronic Data Systems Corp. (dated July 12, 1989) at 3-6 (EDS Amendment Comments); Reply Comments of the IDCMA (dated Aug. 1, 1989) at 5-8 (IDCMA Amendment Reply).

[60] This capability refers to information ESPs need to analyze traffic volumes and congestion on their lines. *See* Tymnet Ex Parte Letter, *supra* note 57 (listing as desired capability).

[61] *BOC ONA Order*, 4 FCC Rcd at 57-58, para. 106.

[62] *North American Telecommunications Ass'n.*, 101 FCC 2d 349 (1985) (*NATA/Centrex Order*), *on recon.*, 3 FCC Rcd 4385 (1988)(*NATA/Centrex Reconsideration*).

[63] Id. at 358, para. 23, at 360, 364-65; Second Computer Inquiry, Final Decision, 77 FCC 2d 384, 421, para. 98 (*Computer II Final Decision*), *modified on reconsideration*, 84 FCC 2d 50 (1980), *further modified on reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom., Computer and Communications Indus. Ass'n v. FCC, 693 F. 2d 198 (D. C. Cir. 1982), cert. denied*, 461 U.S. 938 (1983), *aff'd on second further reconsideration*, FCC 84-190 (released May 4, 1984).

[64] *NATA/Centrex Order, supra* note 62, 101 FCC 2d at 359, para. 24.

[65] *Id.* at 363, para. 34; *NATA/Centrex Reconsideration, supra* note 62, 3 FCC Rcd at 4392, App.A.

[66] *Computer II Final Decision, supra* note 63, 77 FCC 2d at 421. *See also NATA/Centrex*, 101 FCC 2d at 360, 64-65.

[67] We also note that AT&T and the BOCs are already offering many of the OSS capabilities listed above to customers under tariff, either individually or bundled with other services. *See, e.g.*, AT&T Tariff F.C.C. No. 1 § 6.4. BellSouth states that it made that classification decision because of the usefulness and significant demand for its proposed OSS services, as well as the fact that it will offer these capabilities through its OSS access interface on a widespread common carrier basis in state and federal tariffs. BellSouth Open Network Architecture Plan Amendment (dated May 19, 1989) at 18-20 (BellSouth Amendments). NYNEX states that the four capabilities it proposes initially to offer through its OSS access vehicle will be available as optional tariffed services to all ESPs. Letter from Donald W. Boecke, Washington Counsel, NYNEX, to Donna R. Searcy, Secretary, FCC (dated Feb. 28, 1990) at 1-2 (NYNEX February 28 Ex Parte Letter). Those services proposed for initial availability are trouble reporting, testing capabilities, performance monitoring, and secure access to Centrex rearrangement capabilities. *Id.* SWBT currently offers OSS capabilities on a customer-specific basis, but states that it plans to offer access on a tariffed, BSE basis in the future. Second Amendment to SWBT Company's ONA Plan (dated May 19, 1989) at 63-64 (SWBT Amendments). US West currently classifies its Automatic Circuit and Trunk Monitoring Service (ACTM) (providing end user control

of circuit diagnostics for data and voice telecommunications networks) and COMMAND A LINK (providing network reconfiguration, trouble isolation, and status reports, among other services) OSS capabilities as BSEs. *See* US West's Response to Commission's Dec.22, 1988 Memorandum Opinion and Order (dated May 19, 1989), at 20-22, 59 (US West Amendments).

[68] Pacific Bell and Nevada Bell, Further Amendment to Plan to Provide ONA (dated May 19, 1989), at 26-27 (Pactel Amendments).

[69] We do not, of course, address whether these services are "information services" within the meaning of the Modified Final Judgment. *See generally* United States v. American Tel.& Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[70] *Phase I Order*, 104 FCC 2d at 1065, para. 217.

[71] *BOC ONA Order*, 4 FCC Rcd at 59 & n.207.

[72] ADAPSO Petition at 8-11. ADAPSO contrasts this with billing and collection services provided by the BOCs to IXCs because the BOCs cannot provide interLATA services.

[73] ONA Users' Group Petition at 3. The ONA Users Group cites our decision to require the BOCs to continue to offer recording services to IXCs on reasonable terms until the conversion to equal access was complete. *Id.* at 3-4, *citing* Detariffing of Billing and Collection Services, 102 FCC 2d 1150, 1174 (*Detariffing Order*), *recon. denied*, 1 FCC Rcd 445 (1986) .

[74] *Id.* at 4.

[75] *Id.* at 7.

[76] ADAPSO Reply at 6; ONA Users Group Reply at 9-10, ANPA Reply at 5-6.

[77] Ameritech Comments at 6-7; Bell Atlantic Opposition at 6; BellSouth Comments at 5; NYNEX Opposition at 6-8; Pactel Opposition at 14-15; US West Opposition at 4.

[78] Ameritech Comments at 6; Pactel Opposition at 14-15.

[79] BellSouth Comments at 6.

[80] NYNEX Opposition at 6.

[81] We address the issue of ESP billing of casual users, as opposed to regular subscribers, in the *BOC ONA Amendment Order*, para. 32 & n. 59.

[82] *See generally Detariffing Order*, *supra* note 73, 102 FCC 2d at 1169, para. 34.

[83] We distinguish billing information services, such as delivery of calling number identification, which an ESP may need to do its own billing, from billing and collection services, under which a BOC bills and collects the ESP's charges. *See* Cincinnati Bell Tel. Co., CC Docket No. 89-323, FCC 90-30, 5 FCC Rcd 805, 808-09, paras. 33, 36 & n. 13 (1990).

[84] *BOC ONA Amendment Order*, para. 33. The ONA Users Group assertion that NYNEX has imposed improper requirements for the use of NYNEX's INFO-LOOK Gateway raises related questions. We have decided that it would not be appropriate to address those questions in this generic proceeding.

[85] *BOC ONA Order*, 4 FCC Rcd at 116, para. 226, at 143, para. 276.

[86] *See generally id.*, 4 FCC Rcd at 144-46, paras. 277, 279-80.

[87] *Compare* Pactel Petition at 2-4; BellSouth Comments at ii, 1-5; US West Opposition at 2 n. 3; Bell Atlantic Reply at 1, 5-6 (challenging jurisdiction to tariff federally) *with* ADAPSO Petition at iii, 1-2, 21-23 (requesting extension of federal tariffing jurisdiction).

[88] Pactel Petition at 4, *citing BOC ONA Order*, 4 FCC Rcd at 141, para. 274.

[89] *See, e.g.*, CONAP Opposition at 2-3; ADAPSO Opposition at 3-4; MCI Comments at i-ii, 7-10; API Comments at 12-14; AT&T Opposition at 2-4; ONA Users Group Opposition at 4-6; TCA Opposition at 5-6.

[90] 47 U.S.C. § 152 (a).

[91] 47 U.S.C. § 153 (a) (emphasis added).

[92] Pactel Petition at 3.

[93] *See generally* 47 U.S.C. § 153 (e) (definition of interstate transmission).

[94] BellSouth Comments at 2. BellSouth states that federal jurisdiction depends on whether "the interstate use of intrastate BSEs is intended and authorized by the applicable state commissions and BOCs providing the relevant intrastate services." BellSouth Reply at 9.

[95] 47 U.S.C. § 203.

[96] ADAPSO Opposition at 3 & n. 7; MCI Comments at 10 & n. 26, 11 & n. 27; ONA Users Group Reply at 2-3 & n. 4.

[97] Ameritech Operating Companies, Tariff FCC No. 2, §§ 6.3.1 (A) (10), (11) (hunting), 6.3.1 (A)(2) (Automatic Number Identification); Pacific Bell Tariff F.C.C. No. 128, § 6.2 (hunting and ANI). Whether or not these tariffs may be subject to additional or different requirements, including unbundling, is an issue in the *Part 69 Rule Making*, *supra* note 6.

[98] *See, e.g.*, Ameritech Operating Companies, Tariff FCC No. 2, § 6.3.1 (A)(10),(11).

[99] Pactel Petition at 4.

[100] *Id.* at 4.

[101] *BOC ONA Order*, 4 FCC Rcd at 143 n. 625.

[102] "We therefore require each BOC to provide ONA services through federal tariffs by treating its interstate access services as BSAs and offering unbundled interstate BSEs with such access services when it is technically feasible to do so." *BOC ONA Order*, 4 FCC Rcd at 143, para. 276 (footnote omitted). Earlier in the order we stated that "if an ESP takes an interstate access arrangement (*e.g.*, a feature group) for access to a BOC's network, any interstate BSEs that are technically compatible with that access arrangement must be unbundled in its federal tariff." *Id.*, 4 FCC Rcd at 49, para. 86 (footnote omitted).

[103] The *BOC ONA Order* suggests that existing interstate access arrangements could serve as interstate BSAs. 4 FCC Rcd at 143, para. 276. These offerings provide access to the local network for origination or termination of, *inter alia*, interstate interexchange traffic.

[104] 47 U.S.C. § 153 (a). *See* the discussion *supra* para. 38.

[105] Pactel states that those BSEs that are presently bundled in the federal access tariffs are "always utilized in interstate common carriage." Pactel Petition at 3 n. 7. This statement would appear to concede the validity of our analysis in text, or to suggest that federal tariffs have for years wrongly included features and functions that are not subject to federal jurisdiction. We note that subsequent to the *BOC ONA Order*, the *Part 69 Rule Making* decided not to propose "mixing and matching" of state and federal BSAs and BSEs. 4 FCC Rcd 3983, 3989, para. 43. Pactel's petition, filed prior to the *Part 69* Rule Making, apparently assumes the permissibility of mixing and matching and may be contending only that an unbundled interstate BSE used with an intrastate access service would not be interstate in character. Pactel Petition at 3 n. 7. If so, Pactel is discussing a moot question.

[106] *BOC ONA Order*, 4 FCC Rcd at 48-49, para. 86.

[107] Pactel Petition at 4.

[108] *BOC ONA Order*, 4 FCC Rcd at 143, para. 276. *See also* AT&T Opposition at 4-5.

[109] *Phase I Reconsideration*, 2 FCC Rcd at 3043, paras. 51-52.

[110] AT&T Opposition at 5.

[111] For basic service long-distance calls, the tariffing of the physically intrastate access portion of the calls generally depends on the end-to-end nature of the calls. If the end-to-end long-distance call is intrastate, the state tariffing regime applies. If the end-to-end long-distance call is interstate, this Commission's federal access regime applies to the local access portion of the call. MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, 93 FCC 2d 241, 261 (1983)(Third Report and Order), *modified on further recon.*, 97 FCC 2d 682 (1983) (Further Reconsideration Order), *modified on second further recon.*, 97 FCC 2d 834 (1984), *aff'd in pertinent part sub nom.* National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F. 2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985), *modified on further recon.*, 99 FCC 2d 708 (1984), *aff'd sub nom.*, American Tel. and Tel. Co. v. FCC, 832 F. 2d 1285 (D.C. Cir 1987), *modified on further recon.*, 101 FCC 2d 1222 (1985), *recon. denied*, 102 FCC 2d 849 (1985).

[112] *See supra* note 8.

[113] Pactel Petition at 4. *See also* BellSouth Comments at ii, 1-2.

[114] 47 U.S.C. § 152(b). We also do not agree with Bell Atlantic, which supports Pactel's petition, that federal tariffing of BSEs would mean the end of the ESP exemption and that we lack the authority to permit ESPs to choose between state or federal tariffed offerings for their interstate traffic. Bell Atlantic Reply at 1, 6-7 & n. 20. The *Part 69 Rule Making*, which is considering the manner in which BSE tariffing should be implemented, has tentatively concluded that the existing exemption should be retained in its present form. *Part 69 Rule Making*, *supra* note 6, 4 FCC Rcd at 3987, para. 30. In addition, customers are not necessarily precluded from taking services tariffed at the state level as building blocks used in connection with interstate services. *See, e.g.*, Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 746 F. 2d 1492 (D.C. Cir. 1984); Diamond Int'l Corp. v. FCC, 627 F. 2d 489 (D.C. Cir. 1980).

[115] 476 U.S. 355 (1986).

[116] BellSouth argues that our federal tariffing requirement is an unlawful prescription, pursuant to Section 205 of the Communications Act. BellSouth Comments at 2-3; BellSouth Reply at 9-10. Our decision to require the filing of federal tariffs for BSEs is not an exercise of our Section 205 prescription authority. Rather, it is an exercise of our authority to adopt rules implementing our federal tariffing authority pursuant to Section 203, and our authority under Section 201(a) to require carriers to provide service upon reasonable request.

[117] 47 U.S.C. § 151.

[118] At the second meeting of the ONA Joint Conference on November 14, 1989, in Boston, for example, some state commissioners urged that the federal government should "forbear" from requiring any federal tariffing of ONA elements, and instead rely solely on state tariffing for ONA services. *See generally* Communications Daily, "Middle Ground Proposed for ONA Tariffing Dispute" (Nov. 5, 1989), at 2-3.

[119] *Part 69 Rule Making*, *supra* note 6, 4 FCC Rcd at 3989, paras. 43-46.

[120] *Id.* at 3987-89, paras. 29-37, 47.

[121] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, FCC 90-149 (adopted Apr. 13, 1990; released Apr. 25, 1990).

[122] *BOC ONA Order*, 4 FCC Rcd at 36, para. 57, at 47, para. 83, at 48 n. 157, at 49, n. 161.

[123] *Id.* at 47, para. 83.

[124] *Id.* at 144, para. 277, at 145-46, para. 280.

[125] ADAPSO Petition at iii, 1-2, 21-23.

[126] ADAPSO Petition at 21-23. MCI, in arguing the ineffectuality of ONA, claims that following release of the *BOC ONA Order*, BellSouth has reclassified nearly all of its ONA services as CNSs and will now only be offering eight BSEs. MCI calls this an effort to subvert federal policy, because CNSs are offered only in intrastate tariffs. MCI Petition at 20 n. 39 (citing testimony in Florida PUC proceeding). The proper forum for such an argument is the ONA plan amendment proceeding. We observe, however, that contrary to MCI's assertion, BellSouth's Amendments propose offering 47 BSEs in the near term, not eight. BellSouth Amendments, *supra* note 67, Attachment A.

[127] *See, e.g.*, Bell Atlantic Opposition at 7; SWBT Opposition at 13-14; NYNEX Opposition at 12-13.

[128] Many CNSs, such as call forwarding, are used in connection with both intrastate and interstate calls. The costs associated with such services are apportioned between jurisdictions pursuant to the separations rules. The interstate costs are usually included in the Local Switching access element, and the intrastate costs are usually recovered through separate end user charges and the revenues included in local service revenue accounts.

[129] *BOC ONA Order*, 4 FCC Rcd at 170-71, para. 324.

[130] ADAPSO Petition at 20-21.

[131] BellSouth Amendments, *supra* note 67, at 50; SWBT Amendments, *supra* note 67, at 35-36.

[132] *BOC ONA Order*, 4 FCC Rcd at 148, para. 284, at 163-64, para. 312. BellSouth amended its plan to allow ESPs to continue to take existing services. BellSouth Amendments, *supra* note 67, at 4, 50.

[133] MCI Petition at 20-22.

[134] *BOC ONA Amendment Order*, para. 88.

[135] In addition, California asks us to convene a Joint Board now to consider separations issues relating to ONA.

[136] California Petition at 2.

[137] CONAP Opposition at 6-7.

[138] ICA Petition at 5-6; CONAP Petition at 11-12.

[139] CONAP Petition at ii. ICA similarly urges retention of the structural separation requirement until we are sure that ONA implementation at the state level is consistent with federal ONA requirements. ICA Petition at 5-6.

[140] US West Opposition at 3, 5; NYNEX Opposition at 13-14; Ameritech Comments at 7-8; Bell Atlantic Opposition at 6-7; SWBT Opposition at i, 3-6; BellSouth Comments at 10.

[141] *BOC ONA Order*, 4 FCC Rcd at 113, para. 220.

[142] *Id.* at 115, para. 223.

[143] *Id.* at 113-14, paras. 220-21.

[144] *Id.* at 114, para. 221 & n. 442.

[145] Information Industry Liaison Committee Bylaws, § 3.1, 2.2 (*IILC Bylaws*).

[146] *Id.* § 6.2.4.

[147] CONAP Petition at 13.

[148] *Id.* at 11-12.

[149] *BOC ONA Amendment Order*, para. 88.

[150] *Id.*, para. 16 & nn 25-26, para. 19 & nn 30-32.

[151] California Petition at 3-6; MCI Comments at 5-6.

[152] California Petition at 4-5.

[153] MCI Comments at 5-6.

[154] Ameritech Comments at 7; NYNEX Opposition at 12.

[155] *BOC ONA Order*, 4 FCC Rcd at 142, para. 275.

[156] MCI's suggestion that we convene a Joint Board to establish separations allocations that correspond with Part 69 subelements is also inappropriate because the mandate of the CC Docket No. 80-286 Joint Board is broad enough to allow it to address such a question, should it be warranted.

[157] CONAP Petition at 18; ICA Petition at 4-5.

[158] CONAP Petition at 18.

[159] *Id.* at 16-17.

[160] *BOC ONA Order*, 4 FCC Rcd at 190, para. 363. We observe that petitioners offer no delimitation of the "geographic market" to be used in the deployment schedules and we will continue to leave, at least in the first instance, the definition of market boundaries to the BOC familiar with the local characteristics of its territory.

[161] *BOC ONA Amendment Order*, paras. 93-94.

[162] *Phase I Order*, 104 FCC 2d at 1065, para. 217; *Phase I Reconsideration*, 2 FCC Rcd at 3055, para. 142.

[163] For instance, the *Phase I Reconsideration* required, for each initial BSE that the BOC proposed not to implement at the start, that each BOC's ONA plan include "a schedule for the phased introduction of further ONA capabilities after implementation of the initial set of key BSEs." *Phase I Reconsideration*, 2 FCC Rcd at 3055, para. 143. The Commission also required a schedule for the "phased deployment of . . . initial BSEs throughout a carrier's *geographic service area*. " *Id.* (emphasis supplied). Similarly, the *Phase I Further Reconsideration* required "BOCs whose first ONA plans do not provide for deployment of their initial set of BSEs throughout their territories [to] submit, in addition to their initial schedules, updated plans in every subsequent year until complete deployment can appropriately be scheduled." *Phase I Further Reconsideration*, 3 FCC Rcd at 1145, para. 84 (footnote omitted).

[164] *BOC ONA Order*, 4 FCC Rcd at 207-08, para. 397.

[165] *Id.*, para. 396.

[166] *Phase I Reconsideration*, 2 FCC Rcd at 3055-56, para. 143.

[167] *See supra* para. 44.

[168] *Cf.* Notice of Proposed Rule Making, GTE Sprint communications Corp., *et al.*, CC Docket No. 85-348, FCC 85-604, para. 34 (released Dec. 5, 1985), Report and Order, FCC 86-280 (released June 19, 1986) (declining to direct that end offices be converted to equal access only on a LATA-wide or SMSA-wide basis, as this might delay the provision of equal interconnection pursuant to the MFJ court schedule).

[169] CONAP Petition at 16-17.

[170] *BOC ONA Order*, 4 FCC Rcd at 201, para. 383.

[171] EDS Petition at 18-19. An ISDN local loop consists of two B-channels, operating at 64 Kb/s, and one D-channel operating at 16 Kb/s. In a typical operation, the B-channels would be used as information-bearing channels (for data or digitized voice), and the D-channel would be used as an out-of-band signalling channel in conjunction with the CCS7 network. Because the D-channel operates in the packet mode, however, it can also be used as an information-bearing channel connected directly to a packet network.

[172] VANs provide packet switched transport services in conjunction with protocol processing and other enhanced services. VAN packet switching services are directly substitutable with those of a BOC-affiliated packet switching service.

[173] EDS Petition at 18-19.

[174] The IILC Technical Working Committee Task No. 010 (ESP Frame Relaying Access to ISDN Customers) was initiated on January 15, 1989. A proposed technical solution was approved by the full IILC on October 25, 1989. At the present time the interface standards aspects of the proposed technical solution are being refined in the ECSA-sponsored T-1 Committee process. Scheduled annual reviews by the IILC will update the results of the T-1 Committee, the BOCs' plans for implementation, and the plans of switch manufacturers.

[175] *See Phase I Order*, 104 FCC 2d at 1029, paras. 133-166 (CEI Standards and Parameters).

[176] *Phase I Order*, 104 FCC 2d at 1037, paras. 151-153.

[177] *BOC ONA Order*, 4 FCC Rcd at 94, para. 181.

[178] ADAPSO Petition at 16, citing *Phase I Reconsideration* at 3056, para. 150. The BSE criteria are: "expected market demand for such elements, their utility as perceived by enhanced service competitors, and the technical and costing feasibility of such unbundling." *Phase I Order*, 104 FCC 2d at 1065, para. 217.

[179] ADAPSO Petition at 17.

[180] Ameritech Opposition at 6, Bell Atlantic Opposition at 4, BellSouth Opposition at 8, Pacific Opposition at 13, SWBT Opposition at 10-12, US West Opposition at 4.

[181] Bell Atlantic Opposition at 4.

[182] *Phase I Order*, 104 FCC 2d at 1038, para. 153.

[183] *BOC ONA Order*, 4 FCC Rcd at 251, para. 487.

[184] We incorporate by reference the record on this issue from the *BOC ONA Amendment* proceeding.

[185] NYNEX Petition at 2. Ameritech states that, as required by the *BOC ONA Order*, it will report on BSEs and CNSs; however, it supports the NYNEX Petition regarding BSA level reporting only. Open Network Architecture Plan of the Ameritech Operating Companies (dated May 19, 1989), at 119 (Ameritech Amendments).

[186] NYNEX Petition at 4 n.7.

[187] Joint BOC Petition at 3-6. By "service code," the BOCs apparently refer to their service order systems' classifications for their various underlying access arrangements. *Id.* at 3. BellSouth contends that the NYNEX and Joint BOC Petitions are "generally synonymous" with respect to installation reporting categories because "service orders can be categorized for reporting purposes on the basis of the principal type of service which the customer has ordered." BellSouth Reply at 3 n. 4.

[188] In addition, AICC states that Ameritech's offer to provide BSE and CNS level information proves that this BOC ONA Order requirement is realistic. Alarm Industry Communications Committee, Comments on the BOC ONA Plans (dated July 12, 1989) at 49-52.

[189] CONAP Opposition at 5.

[190] MCI Comments and Opposition at 14-15.

[191] *See e.g.*, SWBT Reply at 2.

[192] Bell Atlantic states that reporting of trouble for BSEs provides little information because BSEs seldom need to be repaired, representing only 1 percent of trouble reports. Bell Atlantic Reply at 2-3; *see also* Pactel Reply at 9; Pactel Amendments, *supra* note 68, at 87; SWBT Reply at 9. Bell Atlantic argues that it could cost $1.3 million for initial development and training to revise the maintenance reporting system, and $3 million annually to do ongoing training, coding and tracking even after the software modifications. Bell Atlantic Reply at 4; *see also* Pactel Reply at 7-8; SWBT Reply at 8; Letter from Janis R. Atherton, Manager-Federal Regulatory, to Donna R. Searcy, Secretary, FCC (dated Feb.23, 1990).

[193] Joint BOC Petition at 4.

[194] *See* Letter from Marie B. Stasiorowski, Director, FCC Relations, Bell Atlantic, to Donna R. Searcy, Secretary, FCC, dated Feb. 13, 1990; Letter from Gary J. Dennis, Director-Federal Regulatory, BellSouth to Rose M. Crellin, Common

Carrier Bureau, FCC, dated Feb. 12, 1990; Letter from Donald W. Boecke, Washington, Counsel, NYNEX, to Donna R. Searcy, Secretary, FCC, dated Feb. 12, 1990; Letter from Alan C. Thiebaud, Executive Director-Federal Regulatory, SWBT, to Donna R. Searcy, Secretary, FCC, dated Feb. 9, 1990; Letter from Elridge A. Stafford, Director-Federal Relations, US West, to Donna R. Searcy, Secretary, FCC, dated Feb. 16, 1990; Letter from Celia Nogales, Federal Regulatory Relations, Pactel, to Rose M. Crellin, Common Carrier Bureau, FCC, dated Feb. 20, 1990.

We continue to require reporting by total service orders. We recognize, however, that not all BOCs are providing services within all categories listed in Appendix B. If a BOC is not providing any services within a given category, it will not have any information to report for that category.

[195] We are no longer also requiring reporting according to a sampling of customers. The BOCs must report total orders for their ESP operations and for all other customers, so that such a sampling is unnecessary.

[196] Joint BOC Petition at 2-3.

[197] We require herein that BOCs also report percentage of dues dates missed by category for installation and maintenance to facilitate the review of these reports.

[198] Joint BOC Petition at 2.

[199] *BOC ONA Order*, 4 FCC Rcd at 251 para. 488, n. 1174.

[200] In those cases, average interval and total orders must be reported separately for maintenance activities on designed and nondesigned systems.

[201] *Phase II Order*, 2 FCC Rcd at 3094-95, para. 153. CPNI refers to "all information about customers' network services and customers' use of those services that a BOC possesses by virtue of its provision of network services." BOC ONA Ord er, 4 FCC Rcd at 215, para. 411.

[202] Dun & Bradstreet Petition at 6-7; Dun & Bradstreet Reply at 8. *See also* ATSI Comments at 3.

[203] *See Atlantic Opposition at 4 n. 13; BellSouth Comments at 11; NYNEX Opposition at 10-11; Pactel Opposition at 11; US West Opposition at 4.*

[204] Furnishing of Customer Premises Equipment and Enhanced Services by the American Tel.& Tel. Co., 102 FCC 2d 655 (1985), *modified on recon.*, 104 FCC 2d 739 (1986); Furnishing of Customer Premises Equipment by the Bell Operating Tel. Companies and the Independent Tel. Companies, 2 FCC Rcd 142 (1987), *modifed in part on recon.*, 3 FCC Rcd 22 (1987).

[205] *Phase II Order*, 2 FCC Rcd at 3094-3095. *See Phase II Reconsideration*, 3 FCC Rcd at 1162-64; *BOC ONA Order*, 4 FCC Rcd at 211, para. 402.

[206] Bell Atlantic Opposition at 4 n. 13; NYNEX Opposition at 10; US West Opposition at 4.

[207] ECSA was voluntarily established in 1983 by the local exchange carrier industry just prior to divestiture to address standards and other issues related to the interconnection their facilities with those of interexchange carriers. The IILC is intended to serve as an "interindustry mechanism for the discussion and voluntary resolution of industry-wide concerns about the provision of [ONA] services and related matters." *BOC ONA Order*, 4 FCC Rcd at 31, para. 49, citing *IILC Bylaws* at 1.

[208] *Id.* at 33, paras. 52-55.

[209] The issues included: (a) procedures for ensuring uniformity among ONA services; (b) the ONA applications of new technologies such as ISDN and CCS7; (c) procedures for receiving ESP inputs regarding their use of new network technologies; (d) the provision of OSS capabilities; and (e) the provision by the BOCs of information to be used for the billing of ESP customers. *See BOCONA Order*, 4 FCC Rcd at 255, para. 496.

[210] ADAPSO Petition at 24.

[211] EDS Petition at 19-20.

[212] ONA Users Group Petition at 16; *see also* API Comments at 7. The ONA Users Group asserts that the IILC process is unsatisfactory because: (a) the committee structure and consensus process favor the BOCs over the non-carriers because the latter do not have sufficient resources to attend all the meetings; (b) consensus findings are not binding on the BOCs; (c) insufficient progress has been made on uniformity issues -- the BOCs still have not committed to the line-side delivery of CNI in the pre-ISDN environment; and (d) the BOC task force established to develop procedures for the dissemination of state tariff information still has not done so. ONA Users Group Petition at 12-15.

[213] Ameritech Opposition at 5-6; Pactel Opposition at 17; SWBT Opposition at 14-15.

[214] *See generally BOC ONA Amendment Order*, paras. 14, 18 & nn 27-28.

[215] *Id.*, para. 18.

[216] For each service category, BOCs may also provide a second average interval number that excludes customer-driven dates.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-2
Phase I

In the Matter of

Filing and Review of Open Network Architecture Plans

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 1990; Released: May 8, 1990

By the Commission:

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I. INTRODUCTION

1. On November 17, 1988, the Commission adopted the *BOC ONA Order*,[1] approving in part the Open Network Architecture (ONA) plans of each of the Bell Operating Companies (BOCs), but requiring various modifications to each plan. Eleven parties filed petitions for reconsideration of that order. On May 19, 1989, pursuant to the directions in the *BOC ONA Order*, each of the BOCs filed an amended ONA plan. After reviewing the amended plans and considering comments filed by interested parties,[2] we conclude that the amended plans comply substantially with the requirements of the *BOC ONA Order*. In this order, we approve each plan, subject to certain further modifications, and establish a process for removal of structural separation requirements. We also establish procedures for ongoing oversight of the ONA process, recognizing that a number of long-term ONA issues are not yet ripe for resolution, and that further issues are likely to arise in the future. In our companion *BOC ONA Reconsideration Order*, we address the reconsideration petitions.

II. BACKGROUND

2. As explained in greater detail in the *BOC ONA Reconsideration*, the *Computer III* proceeding [3] created a new regulatory framework, known as Open Network Architecture, to govern BOC participation in the enhanced services marketplace and open up network-based opportunities for competing Enhanced Service Providers (ESPs). The Commission articulated the principles underlying ONA in 1986, instructed the BOCs to work with ESPs and file ONA plans consistent with these principles on February 1, 1988, and conditioned removal of existing structural separation requirements on approval and implementation of these plans.

3. In December 1988, the *BOC ONA Order* addressed in detail the initial ONA plans filed by the BOCs. The Order concluded that the initial ONA plans reflected substantial efforts by the BOCs, and were a positive first step towards realization of our ONA policies. The Commission directed the BOCs to file amended ONA Plans on May 19, 1989, however, consistent with specific guidance in the Order. The *BOC ONA Order* clarified a number of key ONA concepts.

4. First, the Commission approved the common ONA model developed by the BOCs and Bell Communications Research, Inc. (Bellcore). Under this model, ESPs obtain access to various optional, unbundled ONA services, termed Basic Service Elements (BSEs) through access links described as Basic Serving Arrangements (BSAs). Other elements of the model include Complementary Network Services (CNSs), which are optional, unbundled basic service features that an end user may obtain from a carrier in order to receive or utilize an enhanced service, and Ancillary Network Services (ANSs), which are unregulated services, such as billing and collection, that may be useful to ESPs.

5. Second, the Commission generally accepted as adequate the BOCs' proposed initial ONA service offerings. However, noting differences among the BOCs in these offerings, the Order required each BOC that had not already done so to review the plans of the other BOCs and to augment its initial offerings, to the extent possible, based on this review.

6. Third, the Commission recognized the Information Industry Liaison Committee (IILC) as the proper vehicle for inter-industry efforts to address a number of technical ONA issues. The Order directed the BOCs to continue working through the IILC to achieve greater uniformity in nomenclature, technical characteristics, availability, and deployment of ONA services, and to amend their plans to reflect progress in these areas.[4]

7. Fourth, the Commission concluded that ONA service offerings that are subject to "dual jurisdiction" as common carrier communications services must be tariffed at both the federal and the state level.[5] The Order required each BOC to offer interstate ONA services through federal tariffs providing interstate access services as BSAs and offering unbundled interstate BSEs with such access services to the extent technically feasible.[6] The Commission also stated that it would initiate a Rule Making proceeding to amend Part 69 of our rules to accommodate unbundled BSEs.[7] In addition, the Commisson scrutinized the BOCs' state tariffing plans to ensure that these BOC plans did not undermine fundamental ONA objectives and were sufficiently clear and complete. It found that the Ameritech and NYNEX plans satisfied this test, and directed the other BOCs to provide additional information on their tariffing plans. The Order also rejected a BellSouth plan that would have precluded ESPs from using their existing access arrangements.[8]

8. Fifth, the Commission required the BOCs to file three-year deployment schedules for their initial ONA services showing the percentage of access lines, on a system-wide basis and in designated market areas, on which they will offer each of their initial ONA services.[9] The Order also asked the BOCs to include in these schedules, as feasible, other (*i.e.*, non-initial) ONA services that they will introduce prior to July 1992.[10] In addition, the Commission directed the BOCs to describe how ESPs may provide input for the network planning process, and asked the BOCs to make certain commitments with respect to the processing of ESP service requests.[11] Moreover, we directed the BOCs to describe their plans for deploying advanced technologies such as CCS7, ISDN, and Intelligent Network, and to describe ONA services that they will be able to offer through these technologies.[12]

9. Finally, the Order further refined the Commission's nonstructural safeguards. In particular, it eliminated unnecessary reporting requirements, modified the format for installation and maintenance reports, approved the BOCs' network information disclosure plans, and required certain changes in their customer proprietary network information (CPNI) plans.[13]

III. ONA PLAN APPROVAL AND REMOVAL OF STRUCTURAL SEPARATION

10. The overarching issue in this proceeding is whether we should approve the BOCs' amended plans and remove structural separation requirements. The *BOC ONA Order* stated that we would do so if the BOCs modified their

ONA plans as required by that Order. Most commenting parties find fault with at least one aspect of each of the BOCs' amended plans, although the parties are divided as to how we should remedy these alleged defects. The vast majority of commenting ESPs and end users urge us to reject the plans and retain structural separation until the plans are modified in various respects. MCI and IDCMA also argue against ONA plan approval.[14] On the other hand, the BOCs, Northern Telecom, and the Ameritech States urge us to approve the plans outright. Occupying a middle ground, AT&T and Tymnet appear to favor (or do not oppose) plan approval, subject to certain modifications and continued Commission oversight.[15] NTIA favors plan approval, subject to continued FCC oversight of the ONA process.[16]

11. We hereby approve the amended ONA plans, subject to the changes specified in this order. The *BOC ONA Order* required each BOC to modify or supplement its ONA plan in specified ways. As discussed below, the BOCs have largely complied with this directive. Moreover, they have expanded their ONA offerings and made considerable progress in addressing uniformity and other issues. Thus, the amended plans represent a substantial improvement over the initial ONA plans. We emphasize that ONA is an evolutionary process, but find that the amended ONA plans (subject to the changes specified in this order), provide sufficient near-term protections to prevent the BOCs from discriminating against their ESP competitors, and will afford ESPs increased opportunities to use the BOCs' networks in new and more efficient ways. We also adopt procedures to ensure that the BOCs comply with their continuing obligation to implement ONA.

12. Each BOC must file certain amendments that we require herein on July 15, 1990. If the amendments satisfy our requirements, we will take no further action with respect to them. However, if necessary to resolve questions raised by the amendments, we will request more information, seek public comment, and/or require further plan revisions.

13. Structural separation requirements will be removed for each BOC when it files a notice with us informing us that it has taken the following steps required for initial ONA implementation.[17] Specifically, each BOC must notify us that: (a) it is technically prepared to offer each of its initial ONA services; (b) federal tariffs for each of its initial interstate ONA services are in effect;[18] and (c) it has filed state tariffs for each of its initial intrastate ONA services.[19]

IV. CONTINUING COMMISSION OVERSIGHT OF ONA

14. A number of commentors state that we must establish safeguards to ensure that ONA develops over the long term in a manner that is consistent with our goals and requirements. For example, CBEMA/ADAPSO, ATSI, and NTIA recommend that we require annual ONA filings from each BOC providing various kinds of information.[20] Telenet, AT&T, and EDS propose that we require the BOCs to file informational CEI plans for each new enhanced service offering for the first three years after plan approval detailing the specific basic services used by the BOCs in their provision of enhanced services.[21] Several parties ask us to establish timetables for the decisions of the IILC and other standards-setting organizations, and others seek establishment of a mediation process for ONA-related disputes that arise in industry fora and are not resolved within the required time-frame.[22] Similarly, Tymnet, Telenet, AT&T, and EDS ask us to establish a streamlined complaint resolution process for issues that cannot be resolved by consensus at the IILC.[23] The BOCs generally dispute all these suggestions.[24]

15. Although we approve the amended plans, we are committed to ensuring that ONA develops in a manner consistent with our goals. We have repeatedly emphasized that ONA is not a short-term fix, but rather a long-term, evolutionary process. Accordingly, approval of the initial ONA plans is one step in this process, not the end of it. Indeed, we recognize that a number of long-term ONA issues are not yet ripe for resolution, and we have no doubt that additional issues will arise in the future. We will continue to oversee ONA development through further proceedings addressing outstanding ONA issues, to be convened as needed. Each of these further ONA proceedings will resolve specific issues that are ripe for resolution at that time, and may identify issues for future resolution.

16. Although periodic reports may be sufficient to enable us to monitor ONA development at some point in the future, we have decided to require the BOCs to submit at least one more amended ONA plan for Commission approval. We accordingly direct the BOCs to file amended plans on April 15, 1991 reflecting progress on a number of issues identified in this order including, but not limited to: (a) implementation of ONA services; (b) development of future technologies, including CCS7, ISDN, and IN, and (c) additional nationwide uniformity in ONA services.[25] Consequently, there is no need at this time to require separate reports to provide this information.[26]

17. We do not establish special complaint procedures for ONA complaints, as some parties request. It appears that most ongoing ONA issues will more appropriately be addressed through industry fora and the further ONA proceedings outlined above. While certain ONA issues might be presented in formal complaints before this Commission in the complaint process, we do not believe it would be appropriate to establish special procedures for processing such complaints.

18. We also decline to prescribe deadlines for action on issues placed before the IILC, as some parties urge.[27] The IILC will address a broad range of issues that vary greatly in terms of their complexity and the ease with which consensus can be reached. Thus, any deadlines that this Commission establishes are likely to be arbitrary and poorly suited to the particular issue. Such deadlines might force the IILC to make decisions that do not reflect a true consensus, or encourage the IILC to focus on issues on which consensus could more easily be reached. Moreover, deadlines that allowed more time than was needed for particular issues might encourage delay. Thus, we find that establishing deadlines for action on IILC issues could be counterproductive. However, as noted above, we require the BOCs to amend their plans on April 15, 1991 to reflect progress at the IILC in a number of areas. If we find that setting deadlines is appropriate in particular cases, we can, of course, take appropriate action.[28]

19. Our decision to eliminate structural separation requirements for BOC provision of enhanced services when the BOCs implement their initial ONA plans will not deprive this Commission of the ability to compel compliance with the BOCs' continuing ONA obligations if the future evolution of ONA is not consistent with our ex-

pectations. In this order we are establishing procedures for continued monitoring of the BOCs' performance individually and the development of ONA generally. In the future we will, *inter alia*, order the deployment of new ONA services or direct the BOCs to broaden the availability of existing ONA services within their service territories, as appropriate, to ensure continuing improvements in ONA over the coming years after structural separation is lifted. Evolution of ONA is and will continue to be one of our highest priorities.

V. ONA MODEL

A. Authorization for ESP Ordering of CNSs for End Users

20. In its initial ONA plan, SWBT stated that it would permit ESPs to order CNSs for their customers only if the ESPs obtain written authorization from those customers.[29] The *BOC ONA Order* concluded that there was insufficient information in the ONA plans regarding the need for a requirement that ESPs obtain written authorization prior to ordering CNSs on behalf of their customers. Accordingly, the *BOC ONA Order* directed all the BOCs to amend their plans to explain in more detail any proposed "authorization" requirements in connection with ESP orders for CNSs to be provisioned on the lines of ESP customers. The Commission also asked the BOCs to state whether they proposed to apply prior authorization requirements to their affiliated enhanced service operations, and required that any BOC intending to apply a different standard to its own affiliate provide detailed justification for such treatment.[30]

21. The BOCs' amendments reflect different approaches to this issue. Bell Atlantic states that it has no plans to impose authorization requirements on either affiliated or non-affiliated ESPs that arrange for CNSs on behalf of their customers.[31] In contrast, Ameritech, NYNEX, and Pactel state that they plan to require prior authorization both for affiliated and nonaffiliated ESPs that arrange for CNSs on behalf of their customers.[32] The other three BOCs propose requiring unaffiliated ESPs to submit a "blanket agency agreement" or "blanket letter of agency" in order to purchase CNSs for their customers, without imposing any such requirement on their affiliates. Such letters would state that the ESP agrees to be liable for any charges for which it cannot produce written authorization to act as the customer's agent. The BOCs assert that these letters are necessary to assign liability in the event of a billing dispute.[33]

22. AICC, MCI, and Tymnet urge rejection of the allegedly "one-sided" ordering procedures of BellSouth, SWBT, and US West. They argue that uniform, nondiscriminatory procedures must be established for all ESPs, including the BOCs' enhanced service operations, to use in obtaining customer authorization and ordering CNSs on the customer's behalf.[34]

23. We find no justification for the "blanket letter of agency" requirement. The underlying issue when an ESP orders CNSs for a customer is which party will be held liable for the cost of the CNS service in the event that a customer later refuses to pay for that service. BOCs express legitimate concern that procedures must be implemented to allow them to assign liability in such cases. If an ESP is able to produce written customer authorization for the purchase of CNSs in the event of a billing dispute, then the customer, rather than the ESP, should be held liable for any disputed charges. However, if an ESP -- affiliated or unaffiliated -- elects not to obtain written authorization when ordering CNSs on the behalf of customers, the ESP must assume responsibility for all CNS charges in the event a customer denies authorizing the service order. This procedure is a reasonable means of ensuring that billing disputes are resolved quickly and efficiently, and allows both BOC-affiliated and unaffiliated ESPs an equal opportunity to protect themselves against liability in the event of a billing dispute with a customer. A "blanket letter of agency," on the other hand, is not dispositive on the issue of liability in a specific dispute, and imposes a discriminatory burden on non-affiliated ESPs. Accordingly, we reject "blanket letter of agency" proposals and require BellSouth, SWBT, and US West to amend their plans by July 15, 1990, to delete any "blanket letter of agency" requirements for ESPs that order CNSs on behalf of their customers. We approve the other BOC plans on this subject because the other BOC plans propose to apply the same requirement to both BOC affiliates and non-affiliated ESPs.[35]

B. Reclassification of ANSs

24. The *BOC ONA Order* clarified that the ancillary services category includes only unregulated services and required each BOC to amend its plan to include only such services in the "ancillary" or "other services" category. All regulated services in the "ancillary" or "other services" category were to be reclassified in the plan amendments as either BSEs, BSAs, or CNSs.[36]

25. In their amendments, Bell Atlantic and US West state that they included no "regulated" services in the ANS category in their original plans, and therefore did not need to reclassify any services.[37] BellSouth, NYNEX, and SWBT state that all the regulated services that they previously identified as ANSs have been reclassified as BSEs.[38] Ameritech states that it has reclassified as BSAs, BSEs, or CNSs sixteen services listed in its initial ONA Plan as "other network capabilities."[39] Pactel retains the ancillary classification for two of the fifteen services that it classified as ancillary in its initial ONA plan.[40] Pactel reclassified thirteen other services originally classified as ancillary as either BSEs, BSAs, "Future", or "Other."[41] No comments were filed in response to the amendments on this subject.

26. The BOCs have generally satisfied our requirement that all regulated offerings previously classified as "ancillary" or "other" services be reclassified as BSAs, BSEs, or CNSs. However, Pactel has retained the classifications of "Other" for some services, and Ameritech includes two services in a classification labeled "P." The *BOC ONA Order* clarified the categories in the ONA model, and required the BOCs to reclassify certain ancillary services as BSAs, BSEs or CNSs, to avoid the proliferation of additional ONA model categories. Moreover, the justification for additional categories such as "P" and "Other" is unclear. We are particularly concerned that classification of ONA services does not become a source of confusion or limit the applicability of ONA safeguards.[42] Accordingly, we require all BOCs with classifications other than BSA, BSE, CNS, and ANS to amend these plans by July 15, 1990, to eliminate these classifications.[43]

C. Billing Information Available to ESPs

27. The *BOC ONA Order* noted that the Commission has detariffed the billing and collection services performed by local exchange carriers (LECs) for interstate interexchange carriers on the ground that these services are competitively available. Accordingly, the Commission declined to require that the BOCs offer billing and collection services to the ESPs.[44] However, the *BOC ONA Order* required that the BOCs specify their plans, if any, to offer services that would provide ESPs with the "underlying information" necessary or useful for the performance of billing and collection functions.[45]

28. The IILC has designated three tasks that address this issue. One involves Uniform Provision of Calling Number Identification (CNI), a key functionality that provides ESPs with the telephone number of a calling party for billing purposes. The IILC recommended ISDN D-Channel access as a long term solution for the provision of CNI, and offered as short term solutions services such as Feature Group D, Message Desk, and Bulk Calling Line Identification (BCLID).[46] The second billing task force is considering the provision of CNI in the near future through a lineside connection.[47] The third billing issue, Information and Delivery Mechanisms for ESP Billing, was designated on May 10, 1989, as a specific response to the *BOC ONA Order*.

29. In their amendments, the BOCs offer various methods by which they will provide underlying information necessary or useful for the performance of billing and collection functions. A number of BOCs note that calling number, called number, and call duration are available through existing tariffed offerings, such as Feature Group D and some Feature Group B access.[48] Several look toward short-term implementation of Message Desk, Calling Number Identification via ICLID or BCLID.[49] Some BOCs also note that they will provide ESPs will Billing Name and Address.[50] Ameritech proposes to provide Call Detail Recording, which provides an ESP with a record of its calls originating and terminating within a single LATA, while SWBT offers to provide recording services to ESPs.[51]

30. A number of parties find the BOC amendments insufficient. For instance, MCI argues that all ESPs should be able to obtain equal access to all billing and related information that a BOC makes available to its own affiliated enhanced service operations.[52] The ONA Users Group argues that this Commission should require the BOCs to conform their plans to that of BellSouth and offer billing services on a nondiscriminatory basis to all ESPs.[53] Telenet argues that the BOCs' CNI proposals lack uniformity, and for the near term, are limited on an interoffice basis to ANI on trunk-side BSAs, which, according to Telenet, are not affordably priced.[54] Telenet asserts as well that amended proposals to offer Call Detail Recording on circuit-switched trunk-side BSAs suffer from the same deficiencies. Telenet also states that Call Detail Recording on circuit-switched line-side BSAs requires ESPs to use a special NXX in each LATA, which is highly undesirable for ESPs such as Telenet. Telenet adds that the Commission should require the BOCs to tariff BNA as a BSE and make it available in conjunction with all switched BSAs.[55]

31. In reply, Pactel suggests that this Commission allow the Technical Working Committee of the IILC to continue working actively on delineating the technical capabilities of the network to provide more sophisticated types of billing information.[56] SWBT argues that this Commission should not grant Telenet's request that BNA be tariffed as a BSE because such action would reverse our earlier decision to detariff all billing and collection services at the federal level, and our decision not to preempt state regulation of billing and collection related services.[57]

32. We believe that the BOCs show sufficient progress on these issues to warrant plan approval, subject to an ongoing obligation to pursue and report on additional progress. This Commission is committed to ensuring that the BOCs provide ESPs with the underlying information necessary or useful for the performance of billing and collection functions. Based on our review and analyis of the current record, it appears that ESPs can use at least two kinds of billing information. First, ESPs find useful Calling Number Identification (CNI) to determine the identity of a caller using their service.[58] Second, ESPs find useful information regarding the Billing Name and Address (BNA) of a customer.[59]

33. We believe, however, that an attempt to reach a final decision on specific ESP requests based on the current record would be premature. In light of the complexity and importance of these issues, we believe that the IILC should be given a chance to complete its review of them. Accordingly, we direct the BOCs to work through the IILC and amend their plans on April 15, 1991 to clarify the specific information that they will make available to ESPs to allow them to bill for their own services. Likewise, we direct the BOCs to work through the IILC and amend their plans on April 15, 1991 to develop means of delivering CNI, or possible CNI alternatives, to ESPs that purchase line-side connections. In the interim, we require the BOCs to make available to ESPs any billing information services that they make available to their integrated enhanced service operations, on the same terms and conditions.

D. ESP Access to Operations Support Systems (OSSs)

34. The *BOC ONA Order* directed the BOCs to amend their plans to specify the OSS services that they are capable of offering to the ESPs in the near term, and to discuss their ability to offer such services in the future.[60] The Order, however, emphasized that technical, security, and network control issues associated with OSSs may need to be resolved before customers can access the BOCs' internal systems. We therefore directed the BOCs to examine, through the IILC, the most feasible means of providing OSS access for ESPs.

35. The IILC began examining OSS issues prior to the *BOC ONA Order*, and subsequently revised its activities to reflect the requirements of that order. The IILC has focused on a "gateway-type" approach to OSS, although it has not reached consensus on issues such as equal access to OSS.

36. In their ONA amendments, the BOCs state that they plan to provide a number of OSS services, often as part of their evolving offerings of Network Management Services to customers. At least four of the BOCs have plans to permit electronic entry of basic service orders, and all except US West propose to offer electronic access to the status of service orders. Most BOCs propose to provide some form of network monitoring and diagnostic capabilities, which ESPs could use to determine any problems or degradation in their service, as well as some ability to conduct testing of basic services. Likewise, several BOCs commit to offering electronic trouble reporting

and trouble status capabilities, which ESPs could use to electronically report service problems in order to facilitate service repair. Several BOCs also plan to provide access to OSS systems that provide traffic measurement and reporting information.[61] The timing varies for implementation by specific BOCs of these capabilities. Some were available during 1989.[62] Others are projected to become available during 1990.[63] Still others are in preliminary planning stages.

37. Certain commentors contend that the BOCs have not provided adequate information about their plans to provide OSS functions. For instance, EDS suggests that we require the BOCs to provide specific kinds of additional information, and Telenet requests that we require certain BOCs to provide more specific dates for implementation of OSS functions.[64] In response, several BOCs provide additional information about their plans to provide certain OSS capabilities.[65]

38. We believe that the BOCs have provided sufficient information about their OSS planning and implementation to warrant approval of their amended ONA plans at this time. They have provided a significant amount of information, which they have updated in light of further developments. As Bell Atlantic correctly notes,[66] certain OSS capabilities are in the early planning stages, and thus further detailed information is likely to change through the time of implementation. Continuing development of these capabilities, however, appears to be quite important to the kinds of services ESPs can provide, so we require the BOCs to update this information when they file their next amended plans on April 15, 1991.

39. In their ONA amendments, none of the BOCs proposes to provide ESPs with direct access to the entire range of OSSs, arguing that such access would compromise network integrity and impede the protection of proprietary network information. [67] Rather, the BOCs generally propose a form of "indirect" OSS access for ESPs, using an intermediary "gateway" processor that would limit ESP utilization of OSS services as necessary to ensure network integrity and to protect proprietary information. For instance, Ameritech states that it is developing an interface module (IM) that will facilitate interaction with present and future OSSs that may be available in early 1990.[68] NYNEX similarly states that it is developing a customer access management system which will provide control and security functions, while also offering an easy-to-use single entry point for customers.[69] BellSouth is providing similar "indirect" access on a tariffed basis.[70]

40. A number of commenters argue that ESPs, like the BOCs, should have direct access to OSS. For instance, MCI contends that direct access allows ESPs the most efficient means of interfacing with and using OSSs. AICC argues that the lack of direct ESP access to OSSs creates a competitive imbalance and states that this Commission should, at a minimum, revisit this issue within a year. AICC adds that if even-handed OSS access does not appear likely at that time, this Commission should prescribe the terms for OSS access by the ESP competitors of the BOCs.[71]

41. Other commenters do not specifically request "direct" access to OSS, but support equal access. For example, IIA asserts that this Commission's overriding concern should be to ensure that all OSS services, whether basic tariffed offerings or not, are provided under the same terms and conditions to all users.[72] Telenet argues that given the "bottleneck" nature of OSS services, the Commission should require that the BOC enhanced service operations access OSS functionalities through the same tariffed OSS gateway offerings used by other ESPs.[73]

42. The BOC replies generally reaffirm their plans to provide ESPs with "indirect" OSS access, while asserting the right to provide direct OSS access to their own enhanced service operations. For example, BellSouth states that requiring indirect access for its own enhanced service operations is incompatible with integrated operations and contrary to the Commission's goal of eliminating the inefficiencies of structural separation.[74] SWBT states that in the event that direct and indirect access are not "comparably efficient,"[75] it will require that both unaffiliated ESPs and its own enhanced service personnel gain OSS access through the same secure gateway.[76]

43. In the *BOC ONA Reconsideration Order* adopted today, we find certain OSS services to be both basic and ONA services. We believe that comparably efficient access by ESPs to OSS functions important to the provision of enhanced services is critical to bringing the promise of ONA to fruition. We agree with the BOCs that "direct access" to OSS functions raises serious questions of network security and control, including the continued proprietary nature of network information regarding individual network customers. On the other hand, we believe that there are serious competitive questions raised by relegating independent ESPs to indirect access status. If, for instance, the BOCs' enhanced services operation has real-time access to OSS information while an independent ESP receives only infrequent access to the same information, the playing field would be far from level. Because the current record does not permit us to conclude that the indirect gateways that the BOCs propose to offer ESPs are comparably efficient to direct access, we require the BOCs' enhanced services operations to take the same access the BOC provides independent ESPs once the structural separation requirements are lifted.

44. Finally, certain commenters advocate uniformity in the provision of OSS services. The ONA Users Group, for instance, asks us to encourage nationwide BOC uniformity in service availability, formats, and technical interfaces so that OSS will be of use to national ESPs whose territories cover multiple BOC regions.[77] AT&T also complains that the amendments display a significant lack of uniformity in the classification and availability of OSS access.[78]

45. BOCs such as Bell Atlantic oppose suggestions that all regions should use uniform OSS software, such as Bellcore CUSTOM software now under development. Bell Atlantic states, however, that its own network management software will be compatible with other BOCs' offerings that meet the Operations Systems Interface (OSI) standards.[79] A number of other BOCs note that issues regarding compatibility between BOC gateway interfaces are being addressed in the IILC.[80]

46. We believe that we should not mandate absolute uniformity in the provision of OSS services. It is not clear that absolute uniformity is critical in the provision of OSS services, and progress toward a significant degree of uniformity is being made in the IILC process. We intend to look to such industry fora to continue making progress in this direction. We therefore require the BOCs to include in their amendments filed on April 15, 1991, de-

tailed information concerning additional progress they have made on uniformity questions, as informed by the IILC and ECSA's T1M1 Committee.

E. Application of Computer III *Rules to BSEs and BSAs*

47. The *BOC ONA Order* required the BOCs to amend their plans to state explicitly that they will offer their BSEs and BSAs in compliance with our *Computer III* rules for BSEs.[81] Each BOC states in its amendments that it will apply our *Computer III* rules to both BSEs and BSAs.[82] No party commented on these amendments, and we find that the BOCs' explicit commitments to offer their BSEs and BSAs in compliance with the *Computer III* non-discrimination and equal access safeguards satisfy our requirements.

VI. INITIAL ONA OFFERINGS

A. Protection of ESPs' Proprietary Information

48. In their original ONA plans, several of the BOCs stated that they had difficulty deciding whether to offer a requested Network Capability (NC) because the ESPs were reticent in providing demand data for new ONA services. Likewise, certain ESPs refused to provide demand data due to concern that the BOCs would use such data to identify market opportunities for their own operations. The *BOC ONA Order* required each BOC to "report on |its| attempts to develop procedures and formats that ESPs may use in requesting ONA services from the BOCs, including the use of contracts or other procedures whereby proprietary market information can be exchanged without sacrificing its confidential status."[83]

49. Following release of the *BOC ONA Order*, the IILC has held a number of discussions aimed at establishing general principles applicable to non-disclosure agreements.[84] Each BOC states that it is participating as a task force member in the resolution of this issue through the IILC, and that it is also evaluating various types of non-disclosure agreements.[85] None of the commenters directly addressed the BOCs' descriptions of the efforts to resolve this issue through the IILC process.

50. We find that the sample confidentiality agreements submitted by a number of the BOCs are evidence that the IILC has made progress in addressing this issue, and believe that it is appropriate to give the IILC additional time to reach a final consensus on the issue. We direct the BOCs to continue working on this issue through the IILC and file amended plans on April 15, 1991 to reflect subsequent developments at the IILC.

B. Application of Non - Technical Selection Criteria

51. The *BOC ONA Order* approved the proposed initial service offerings of the BOCs as a first step in implementing ONA. Although the Commission found merit in ESP claims that additional services must be implemented in the long term, the Order concluded that the initial ONA services proposed by the BOCs were acceptable given the technical limitations of the network, and the lack of quantifiable market demand for certain ONA services. However, the *BOC ONA Order* found that when technical feasibility is not the primary factor for rejecting requests for network capabilities (NCs), the BOCs did not generally provide reasons that are sufficiently detailed to allow us to determine whether their decisions are consistent with the applicable criteria.[86] Accordingly, the Commission required that each BOC include a more detailed description of the manner in which it applied the *Computer III* criteria in determining its initial set of ONA services when technical feasibility is not an issue.[87]

52. Three BOCs explain further their rejection for non-technical reasons of requests for particular NCs. BellSouth states that it has rejected only two NCs on the basis of criteria other than technical feasibility, adding that, in each case, the basis for rejection was not cost, but, market considerations and limited utility.[88] NYNEX states that it originally rejected two NCs, Warm Line and Hot Line, for reasons other than technical feasibility. In rejecting these requests, NYNEX states that it relied on the results of a market study conducted by an outside consultant, which indicated a demand for less than 600 lines for these services over a five-year period. However, NYNEX states that it has since re-examined these decisions, and that "|t|hese two capabilities will be available as BSEs in those central offices where demand has been identified or on a customer specific request basis in other central office locations."[89] Finally, SWBT states that it originally rejected two requests for non-technical reasons. SWBT states that it has re-examined these services and is now planning to offer them as BSEs. However, SWBT states that it has since re-examined other services, and found them to be technically feasible, although it does not plan to offer them "due to the lack of quantified market demand."[90]

53. The other BOCs generally contend that they have not denied any ESP requests for service except on the basis of technological infeasibility.[91] Bell Atlantic nevertheless states that when sufficient demand data do not exist, it will provide service on an individual case basis if the requesting ESP is willing to cover the costs involved. US West challenges the Common Carrier Bureau's conclusion that it has rejected 13 NCs for reasons other than technical feasibility.[92] None of the commenters explicitly addressed the manner in which the BOCs applied non-technical selection criteria in those cases in which a BOC declined to include a specific NC in its initial ONA offerings.[93]

54. As requested, the BOCs have provided additional information on the services that they chose not to offer due to non-technical constraints such as limited market demand, excessive cost, or limited utility to the ESPs. This information confirms the Commission's conclusion in the *BOC ONA Order* that the majority of service request denials by the BOCs are due to current technical limitations. No parties explicitly challenge the sufficiency of this information and we conclude that the BOCs have responded to this requirement in a satisfactory fashion.

VII. COMPLIANCE WITH CEI REQUIREMENTS

A. Interface Information and Technical Characteristics

55. The *BOC ONA Order* required that all the BOCs except Ameritech amend their plans to include a list of documents containing interface information and technical characteristics for their initial ONA services. In addition, that Order required Pactel to amend its plan to state the conditions under which nonaffiliated ESPs will receive ONA services with technical characteristics that are equal to those that its enhanced services operation receives.[94]

56. All the BOCs now provide lists of documents containing interface information and technical characteristics for their initial ONA services.[95] In addition, Pactel states that it will provide nonaffiliated ESPs with ONA services possessing technical characteristics equal to those of the services provided to Pactel's integrated ESP operation, with the qualification recognized by this Commission "that the signal level of an analog data connection will decrease to some extent with the loop distance from the central office."[96]

57. AICC argues that the interface information submitted by the BOCs still contains shortcomings which could be cured or explained. In particular, AICC contends that SWBT should be required to supply technical information for BSEs, CNSs, and ANSs, and that Pactel and US West should explain why they fail to include technical references for NCs useful to the alarm industry, when Ameritech supplies technical references for similar NCs.[97]

58. Pactel provides additional technical reference information on network capabilities useful to the alarm industry in a revision to the material submitted in its Amendment.[98] SWBT also provides a list of technical interface documents that include information requested by AICC.[99] US West states that no formal Bellcore or US West technical document currently exists for the CNS identified in AICC's comments. US West adds that it is currently investigating the need for and possible creation of such a document, and states that in the meantime, it will continue to assist any potential user of this CNS in obtaining necessary technical information.[100]

59. We find that the BOC amendments and replies satisfy the requirements established in the *BOC ONA Order* regarding the provision of interface information and technical characteristics. We expect US West to continue to assist users, as promised, in acquiring technical information for services that US West provides.

B. Minimization of Transmission Costs

60. The *BOC ONA Order* required the BOCs to offer a two-mile initial mileage band as part of a price parity program to satisfy our ONA requirement that the BOCs minimize ESP transmission costs. It also directed US West, Pactel, and BellSouth to amend their plans to clarify how they intended to meet this requirement.[101]

61. US West and Pactel now commit to apply a "two-mile" minimum rate band to their collocated enhanced service operations for distance sensitive transmission services, but state that they will apply the two-mile rule only when their enhanced service operations are physically located in a central office.[102] BellSouth now adopts price parity, stating that it: (a) will take distance sensitive transmission services at the tariffed rates charged ESPs located two miles from the relevant serving wire center; and (b) will charge its own enhanced service operations for the number of access lines and for other ONA services needed to meet the market demand for its enhanced service operations as if those operations were physically located outside the central office.[103]

62. The commenters focus on two questions regarding implementation of the "two-mile" rule. First, a number of parties object to the proposals of Pactel and US West to impute a "two-mile" minimum rate to their own enhanced services only when the BOC enhanced service is actually collocated in one of the BOC central offices.[104] True price parity, according to the ONA Users Group, requires that BOC enhanced service operations, whether collocated or not, take distance sensitive transmission at the tariffed rates charged to ESPs located two-miles from the relevant serving wire center.[105] Likewise, Telenet opposes allowing a BOC to obtain a "short-wire" rate for itself by locating its enhanced services equipment in a "non-CO" space within the same building, or in a different building next to its central office.[106]

63. BellSouth, Pactel, and US West contend that the Commission's rules only apply the two-mile price parity rule to a BOC's collocated enhanced services.[107] However, BellSouth views as reasonable Telenet's proposal for applying the two-mile rule to non-collocated BOC enhanced service operations located within the BOC central office complex, provided that the rule excludes all commercially available space from the definition of a central office complex.[108]

64. NYNEX raises a second issue regarding the two-mile rule, contending that the two-mile rule should not be applied if a central office district boundary is less than two miles from the central office. NYNEX states that this situation exists in a few central offices in Manhattan, and that it is inequitable to require NYNEX to charge itself a two-mile rate that reflects a greater distance than the actual central office service area. When the central office district boundary is less than two miles, NYNEX proposes to charge its affiliate the rate applicable to one-half the longest distance to the boundary.[109] Telenet suggests instead in these situations that NYNEX charge its enhanced service operations the rate applicable to the actual distance to the furthest boundary.[110]

65. None of the commenters challenge the general sufficiency of BellSouth's, US West's, and Pactel's compliance with the two-mile requirement. We do clarify, in two respects, the two-mile rule. The first issue involves defining when an enhanced service is "collocated" at a central office for application of the two-mile rule. We find that the two mile rule should apply only when a BOC's enhanced service is collocated, and that an enhanced service should be deemed "collocated" when an enhanced service is located within a BOC central office complex. This result is logical because competing ESPs have an opportunity equal to that of an affiliated BOC to secure facilities outside a central office complex.

66. The second question concerns a limited number of very small central office (CO) districts that have outer boundaries less than two miles from the CO. In these situations, NYNEX proposes to impute distance sensitive charges as if its enhanced service operations were located at one-half the greatest distance from the CO to the service area boundary, whereas Telenet suggests that the BOC should charge its enhanced service operations the rate applicable to the actual distance to the furthest boundary. We believe that NYNEX's proposal represents a reasonable application of our existing pricing principles to these limited situations. The two-mile rule was established to ensure that collocated BOC enhanced service operations do not have an unfair price advantage over ESPs that do not have collocation opportunities.[111] The rule was not intended to require that the integrated BOC operation be billed at the rate for the maximum distance in all cases, as Telenet proposes.[112] Accordingly, we approve NYNEX's plan for implementing this rule.

VIII. UNIFORMITY

A. Examination of Other BOC Plans

67. Bell Atlantic examined the ONA plans of the other regional BOCs prior to the release of the *BOC ONA Order*, and found that it could add eighteen services to the 58 that it had originally proposed in its plan.[113] The *BOC ONA Order* required each BOC other than Bell Atlantic to "list the additional services it can include in its initial ONA offerings, based on the results of an examination of all other BOCs' proposed initial ONA offerings ."[114]

68. All six BOCs have increased the number of Network Capabilities (NCs) they offer. Ameritech now will satisfy 21 additional NC requests, thus expanding its initial NC offerings to 76.[115] BellSouth has added 15 new NCs, expanding its initial NC offerings to 71,[116] and NYNEX has added four additional NCs, increasing its total to 53 NCs. In addition, NYNEX states that it can offer 23 new services that were identified as part of its independently conducted, regional, Market Outreach Program.[117] Pactel states that it will be able to increase its NC offerings to 73 (from 54), SWBT states that it will be able to increase its NC offerings to 62 (from 49), and US West states that it will be able to increase its NC offerings to 79 (from 54).[118]

69. Some parties nonetheless continue to question the degree of uniformity that has resulted from the examination of the other BOCs' plans. For instance, Telenet notes a "wide variation in the offerings available from region to region."[119] The ONA Users Group faults the BOCs for not providing a minimum set of nationwide ONA offerings, and CONAP alleges that the amended plans reflect an unacceptable 32% level of uniformity.[120] MCI and Tymnet claim that Pactel has failed to comply with the *BOC ONA Order* because Pactel does not offer NCs that other BOCs supply.[121] AT&T notes some progress toward uniformity, but remains concerned about the BOCs' use of different technical means of providing similar services, which it contends hampers IXCs' efforts to determine whether they can transport information to and from the locations needed by ESPs and their customers.[122]

70. In light of the substantial progress shown in the number of NCs initially available,[123] and the commitment by the BOCs to work with ESPs to further increase uniformity of ONA services, we approve this aspect of the BOC plans. The BOCs have examined each other's plans, and have achieved a substantial increase in the availability of ONA services. The results of these examinations are detailed in Appendix C of this Order.[124] On the critical issue of the uniformity of availability, the BOC amendments reflect a 28% increase in the number of services available on a nationwide basis. The BOCs now propose to offer 37 NCs on a nationwide basis, rather than the 29 NCs originally proposed. The number of services available in six or more regions now amounts to 53% of the initial service requests. The individual BOCs have also improved upon their initial plans. In the amendments, each BOC now proposes to offer an average of 70 NCs, up from 54, (which represents 60% of the initial service requests). By any standard, these increases in service offerings reflect substantial progress.

71. The Commission addressed the issue of technical uniformity in the *BOC ONA Order*, and concluded that mandating a single technical method for delivering specific ONA services was not in the public interest.[125] We conclude that the examination of each others' plans by the BOCs and the changes they have made has produced a degree of technical uniformity that is sufficient for initial deployment of ONA services. We remain concerned, however, as does AT&T, with the varying technical arrangements for providing certain services, and the possible impact of such variations on the implementation of interregional services. We note that the IILC is currently addressing both the general and specific aspects of some of AT&T's objections, and require the BOCs to amend their plans on April 15, 1991 to reflect progress on resolution of technical uniformity issues.

B. Cross Referencing and Uniformity of Nomenclature

72. The *BOC ONA Order* required two short-term uniformity initiatives: (a) the development of uniform nomenclature for ONA services; and (b) a cross-referencing manual, or database, identifying those services for which uniformity is either impractical or undesirable.[126] The *BOC ONA Order* requested "[e]ach BOC to describe its efforts, through the IILC, to implement [these initiatives]."[127]

73. To achieve uniformity of nomenclature, an *ad hoc* BOC task force examined the names of the original list of 118 NCs, and developed a list of 92 uniform, generic, NC service names. The task force then used these uniform NC names in a *Cross Reference Guide*, which maps the uniform names with any variations in nomenclature that had been adopted by individual BOCs. For each NC, the Cross Reference Guide lists: (a) the regional BOCs that provide the service; (b) the name used by a specific BOC to identify that service (if different from the generic name); (c) whether a service is classified as BSA, BSE, or CNS; (d) a brief technical description of the NC; and (e) citations to any existing technical reference manuals. None of the parties criticize the BOCs' efforts in developing uniform nomenclature and the *Cross Reference Guide*, and both efforts have substantial utility to ESPs. The IILC is considering additions and updates to the Cross Reference Guide, and the Federal/State Joint Conference is actively monitoring developments in the cross referencing efforts. We direct the BOCs to amend their plans on April 15, 1991 to reflect the additional progress they have made on the *Cross Reference Guide* during the next year.[128]

C. Long Term Uniformity Concerns

74. The *BOC ONA Order* required each BOC to "describe how it will systematically address uniformity issues involving specific ONA services of particular interest to the ESP industry ..."[129] The Commission also noted with approval the existing efforts of the BOCs to develop, through the IILC process, short and long-term approaches to the uniform provision of one ONA service, Calling Number Identification (CNI). The Commission directed the BOCs to continue working through the IILC to develop systematic, long-term procedures to achieve uniformity in other key services and to describe these procedures in their ONA plan amendments."[130]

75. On July 12, 1989, in direct response to the *BOC ONA Order*, the IILC designated a task to develop long-term methods for achieving uniformity in the provision of specific, key services. "[131] Meanwhile, the IILC continues its efforts to produce uniformity in a number of specific ONA services. These efforts remain in progress, and new

services are periodically added for consideration. The following issues have been designated to date by the IILC to develop uniformity in specific ONA services:

(a) Uniform Provision of Calling Number Identification,[132]

(b) ESP/Customer Access to BOC Network Management Systems (OSS),[133]

(c) Access to ISDN D-Channel Frames by ESPs,[134]

(d) Uniform, Non-Geographic Number Access to ESP Services,[135] and

(e) Ability to Detect Breaks in Telco Line within 60 Seconds.[136]

76. The ONA Users Group and Telenet complain of inadequate progress on uniformity. For instance, Telenet claims that "[t]he BOCs have failed entirely to address the Commission's concern regarding the development of a 'more organized, longer term process for ensuring uniformity.'"[137] Three BOCs respond to these criticisms.[138]

77. We find that the BOCs' amendments comply with the request in the *BOC ONA Order* for information on how they plan to address long term uniformity issues, and that the amendments reflect important progress. As noted above, the IILC is actively participating in the resolution of a number of uniformity issues, and consensus has been reached regarding a number of these.[139] Likewise, the IILC has reached consensus on general guidelines for uniformity. Our observation of IILC efforts reveals that substantial progress has been made through ESP and BOC discussions of specific ONA services. BOCs have obtained detailed information about ESP needs and the ESPs have learned about network capabilities and limitations. The participants have also proposed and analyzed a number of different ONA service requests.

78. Obviously, much work remains to be done. We agree with Ameritech, that ESPs should set priorities for the specific capabilities that are being requested in the IILC forum. As discussed throughout this order, we believe that uniformity is very important to achieving key ONA objectives, and we are committed to ensuring that progress continues. The IILC will be working on various uniformity issues during the next year. In light of progress within the IILC, we find that complaints about the inefficiency of the IILC process in developing uniformity for specific, key ONA services are premature. We direct the BOCs to continue to work through the IILC to resolve uniformity concerns, and to file amended ONA plans on April 15, 1991 to reflect further progress in the area.

IX. TARIFFING OF ONA SERVICES

A. Descriptionof State Tariff Structures

79. The *BOC ONA Order* required each BOC, with the exception of Ameritech and NYNEX, to describe its proposed state tariff structures more fully. We stated that unbundling and economical pricing are two hallmarks of an ideal tariff structure for ONA services. We noted favorably NYNEX's plan because NYNEX did not propose to tie the availability of new BSEs to the purchase of new access arrangements. We noted favorably Ameritech's plan because Ameritech proposes cost-based BSEs. The *BOC ONA Order* asked for clarification from the other BOCs regarding their tariffing plans. We also required each BOC except SWBT to include sample tariffs similar in detail to the sample tariffs provided by SWBT.[140]

80. All the BOCs have provided further descriptions of their state tariffing plans. Ameritech remains committed to implementing cost-causative rate structures wherever possible. Ameritech plans to offer ONA services in its intrastate and interstate access tariffs, which it states are virtually identical. It proposes to modify its state access tariffs to implement ONA in a manner similar to the fashion that it modifies its interstate access tariffs to implement ONA. Ameritech states that it does not intend to eliminate any option available to ESPs under existing exchange and access tariffs. Ameritech provides illustrative interstate tariff pages for the types of modifications planned for its federal access tariffs.[141]

81. BellSouth plans to file BSAs and related BSEs in interstate access tariffs for interstate use, in intrastate access tariffs for intrastate/interLATA use, and in its General Subscriber Services Tariff (GSST) for local intraLATA use. BellSouth states that new or newly unbundled BSEs will generally be available only with a new bi-directional usage-sensitive BSA. However, BellSouth states that ESPs will be able to continue to receive existing basic services from existing access tariffs. It states that many CNS capabilities will also be made available with bi-directional usage sensitive BSAs, but at significantly reduced rates. BellSouth believes that a usage-sensitive tariff structure will permit more cost-based ONA pricing, without creating what it terms as pricing anomalies that often occur as a result of flat-rated state pricing policies. BellSouth includes a sample local exchange tariff with ONA services with its Amendment. [142]

82. Pactel states that the manner in which it will apply market demand and cost feasibility criteria for pricing ONA services varies depending upon the type of request involved. Pactel states that ESPs currently pay less than cost for an exchange business line (1 Measured Business or IMB service), and that it has pending in California a request to increase IMB rates. Pactel states that some price changes may result from the unbundling of rate elements from existing tariffed services. Pactel has provided sample tariffs for two existing ONA services and for two existing services that will require unbundling into separate rate elements. Pactel also submits tariffs for six ONA services currently offered as a market trial in California. These are characterized by limited geographic offerings and "multiple price points".[143]

83. SWBT proposes "equivalency pricing" under which the total of the unbundled rates of an existing service should at least equal and never be less than the existing bundled price. It states that equivalency pricing should avoid rate shopping and resulting noneconomic demand shifts. SWBT states that the total price of unbundled elements will include incremental cost, plus a contribution to common cost that equals or exceeds the total contribution above incremental cost found in the bundled price. SWBT provides representative existing tariffs and illustrative tariff material for new ONA services "that have reached a sufficient point in the development process to produce a meaningful illustrative tariff."[144]

84. NYNEX states that the *BOC ONA Order* found that its pricing method, together with the "highly unbundled" structure of its ONA Plan, permits ESPs to take ONA services on an economical and efficient basis. NYNEX reiterates that it will tariff ONA services no differently

than other services, with BSAs and BSEs used for intrastate purposes tariffed in state jurisdictions, and BSAs and BSEs used for interstate purposes tariffed in the federal jurisdiction. NYNEX states that its pricing policy includes two major components, a commitment to cost-based, fair and reasonable pricing and a commitment to price parity. It states that costs will include product costs, factors for rate uniformity and stability, factors for business risk, and a reasonable return. NYNEX provides existing tariffs from representative jurisdictions for certain ONA services. It also provides tariff pages for new services, including preliminary tariffs for services not yet tariffed.[145]

85. US West states that its tariffing plan is very "similar" to that of NYNEX. However, while US West commits to retain existing state services, it does not commit to offer new BSEs with existing access arrangements. BSAs and BSEs used as part of intrastate communications will be tariffed in intrastate tariffs. BSAs and BSEs used for interstate purposes will be offered as part of interstate access. US West has included an illustrative tariff, which references existing tariffs for rates and charges and for other information. It also includes existing tariff pages for various ONA services.[146]

86. Bell Atlantic states that it will offer all state-tariffed ONA services pursuant to the pricing methodology prescribed in each of its jurisdictions. It states that ONA will result in no changes to existing tariff structures or rates, ensuring that ESPs and end users will not be deprived of any existing service offerings or forms of access. Bell Atlantic states that, whenever existing features are unbundled to comply with ONA, those features will also continue to be offered as presently tariffed. However, Bell Atlantic does not commit to provide new BSEs with existing access arrangements. Bell Atlantic states that it has no plans to impose use restrictions on any new ONA services, but notes that many initial ONA services are existing services subject to terms and conditions established by state regulators. Bell Atlantic has supplied tariff pages for existing ONA services from representative jurisdictions and sample tariffs for new ONA services.[147]

87. Several parties comment on the BOCs' state tariffing plans. AICC and MCI, for instance, contend that certain of the BOCs' plans will result in higher rates for ESPs, or will conflict with the Commission's goal of cost-based ONA services.[148] The SWBT States express concern that ONA offerings will be underpriced, thereby forcing states to increase local rates, and urge us to require SWBT to clarify the effect of its plan in each state jurisdiction.[149] MCI also questions Pactel's intention to seek regulatory approval for technology tests, market trials, and provisional tariffs on the grounds that it would permit different charges for like services.[150] Pactel responds that California has permitted Pactel the option of limited market trials when demand data is lacking, and that such trials can result in the expeditious introduction of new services.[151]

88. We believe that all the BOCs have provided additional information and have further clarified their state tariffing plans. The BOCs have not generally adopted the NYNEX and the Ameritech state tariffing models, although these departures do not at this time appear to undermine fundamental ONA objectives. Moreover, we conclude that it would be premature for us to require any specific model for state tariffing, particularly since state tariffing of ONA services is a dynamic process.[152] It will be necessary to examine the actual charges that BOCs file for BSEs or other ONA services to confirm that implementation of state tariffing plans will not unduly hamper the development of enhanced services.[153] Accordingly, we require each BOC to include copies of pending or effective state tariffs for ONA services in its April 15, 1991, amended plan and to provide an explanation of the ratemaking methods that BOCs employed in computing those tariffs.[154]

B. Availability of Existing Services

89. The *BOC ONA Order* directed BellSouth to eliminate its plan to prohibit ESPs from taking basic services from existing tariffs and requiring them to take all basic services out of a new ONA tariff.[155] BellSouth has withdrawn its proposal,[156] and we conclude that BellSouth has now complied with this requirement.

C. ESP - Only Tariffs

90. We directed BellSouth and SWBT to amend their plans either to delete restrictions permitting only ESPs to take BSEs or to provide more complete justifications for such use restrictions.[157] BellSouth has amended its ONA plan to delete proposed use restrictions limiting ONA tariffs only to ESPs.[158] SWBT states that its revised tariff plan does not contain any ESP-only tariffs.[159] We find that the amendments made by BellSouth and SWBT to their ONA plans regarding ESP-only tariffs comply with our requirements.

D. Resale Restrictions

91. The *BOC ONA Order* required Pactel to clarify whether it is proposing resale restrictions on ESPs in addition to or different from those generally applicable to other subscribers. Pactel states in its amendments that it does not intend to create any such resale or other restrictions on ESPs. Pactel notes, however, that it does intend to continue current tariff limitations restricting IXCs from purchasing certain BSAs for use in interexchange service. It adds that an IXC will be able to purchase these BSAs when acting as an ESP.[160] The *BOC ONA Order* concluded that resale restrictions in interstate tariffs that do not specifically apply to ESPs pose little anticompetitive danger to the enhanced services marketplace. Since Pactel has clarified that its resale restriction applies only to IXCs, we conclude that Pactel's amendments now comply with our requirements.[161]

X. INITIAL DEPLOYMENT AND FUTURE EVOLUTION OF ONA SERVICES

A. Deployment of Initial ONA Services

92. The *BOC ONA Order* stated that "[t]aken as a whole, the BOCs provide a substantial amount of useful information on the pace and scope of the initial deployment of ONA services."[162] Nevertheless, the Commission found that additional information from each BOC would be extremely valuable, both to ESPs in planning their service offerings, and to the Commission in evaluating BOC deployment efforts. Accordingly, the Order required each BOC to provide supplemental information on deployment of its initial set of ONA services. Specifically, it required each BOC to project the percentage of its access lines, both on a system-wide basis and in particular market areas, that will be capable of supporting each of its initial ONA services, on July 1, 1990, 1991, and 1992.[163]

In addition, it directed the BOCs to work with the IILC to establish a format for providing ESPs with deployment information for each wire center.[164]

93. In response to the Commission's requirement for system-wide and market area data, each BOC provides schedules showing, for July 1, 1990, 1991, and 1992, the percentages of its access lines, both system-wide and in particular market areas,[165] that will be capable of supporting each of its initial ONA services.[166] BellSouth and US West also indicate the percentage of access lines outside their market areas on which they will offer each initial ONA service.[167]

94. The BOCs' schedules reveal that although they plan to deploy their initial ONA services most heavily in the major metropolitan areas, each BOC will also deploy these services in smaller cities, as well as suburban and rural areas. For example, Pactel indicates that it will deploy a substantial number of ONA services in Monterey, Stockton, and San Luis Obispo. NYNEX shows significant availability of ONA services in its Vermont LATA. SWBT indicates significant ONA deployment in some of its smaller market areas such as Topeka, Wichita, Little Rock, and Tulsa, as well as in small cities outside its major market areas. Similarly, BellSouth and US West project significant ONA deployment in a number of small towns throughout their respective regions as well as outside their identified market study areas. Ameritech and Bell Atlantic also plan to offer their initial ONA services in a broad cross-section of areas.[168]

95. In response to the Commission's request for wire center data, the BOCs state that the Non-Technical Working Committee of the IILC has developed a format for the provision of information on ONA deployment at each wire center.[169] Most of the BOCs attach a copy of this format to their amended plans,[170] although only BellSouth expressly commits to provide wire center data in accordance with this format.[171] Indeed, Bell Atlantic states that due to "the software requirements of the computerized planning system Bell Atlantic uses," its 1990 wire center report will differ somewhat from the format adopted by the IILC.[172] The BOCs also indicate that, in conjunction with the IILC, they are attempting to develop a national data base containing regularly updated information on ONA service availability by wire center.[173] The BOCs state that ESPs and other entities would be able to obtain direct access to this data base.

96. Tymnet argues that SWBT does not make a commitment to adopt the IILC format for wire center data and that Ameritech does not even refer to the IILC format in its plan. Tymnet also states that Bell Atlantic should be required to provide wire center data in the IILC format.[174] In addition, AICC contends that the Commission should require further explanation from BOCs that are not deploying certain services as widely as other BOCs. Tymnet and Telenet specifically fault Pactel for providing deployment data only for lines served by particular switches and not for all of Pactel's access lines.[175]

97. Subject to the caveats noted below, we approve this aspect of the BOCs' plans. Each BOC has generally provided supplemental information, as specified in the *BOC ONA Order*, on its deployment plans for each of its initial ONA services. These schedules indicate fairly widespread deployment of a large number of ONA services over a broad cross-section of communities. However, consistent with our plan to monitor the long-term development of ONA, we direct the BOCs to amend their plans on April 15, 1991 to: (a) list all ONA service requests that it received from ESPs during the previous year, and the disposition of such requests; and (b) identify progress in developing ONA capabilities responsive to ESP service requests previously deemed technically infeasible.

98. AICC, citing differences in the deployment schedules for five particular services, urges us not to approve the BOCs' plans until the BOCs explain and justify these disparities or eliminate them by committing to further deployment of these services. However, AICC does not provide any evidence that these services are technically feasible in areas where they are not scheduled for initial deployment, nor does it provide evidence of a sufficient market for these services in the unserved areas.[176] When a BOC decides not to deploy a requested ONA service in a certain area, based upon a consideration of the four criteria that we established as the benchmark for deployment of ONA services,[177] an ESP claim that some BOCs deploy service on a more widespread basis than others is not, in itself, a sufficient basis for disapproving a plan.[178]

99. Finally, although we approve the BOCs' initial deployment schedules, we require Pactel to amend its schedule by July 15, 1990 to show the percentage of all access lines in its market areas on which it will offer its initial ONA services. We do not find convincing Pactel's assertion that the format of its schedule is more useful to ESPs than the other BOCs' schedules. Rather, we believe that the BOCs' deployment schedules will be more useful to ESPs if they are provided in a consistent format that facilitates comparisons among the BOCs. Likewise, we require the BOCs to continue their work at the IILC to identify a uniform format for providing ESPs with wire center deployment data, and to employ the uniform format that emerges from that effort.

B. ONA Evolution and Future ONA Services

1. ONA Services from New Network Technologies

100. The *BOC ONA Order* stated that ONA is an evolutionary process, rather than a static architecture. It noted that the most significant implementation of ONA will take place in the future, when the BOCs deploy advanced technologies like Common Channel Signaling System 7 (CCS7), Integrated Services Digital Network (ISDN), and Intelligent Network (IN) capabilities. The Commission acknowledged that the BOCs' initial ONA plans were the product of considerable time, energy, and creativity, and commended these plans as a "positive step in the right direction."[179] However, the Order expressed the Commission's disappointment with the lack of specific commitments and information on how, or in some cases even whether, ONA will be implemented through new network technologies and incorporated into the future network planning process. The Commission therefore required the BOCs to supplement those portions of their plans dealing with future network evolution and ONA services. In particular, the Order asked each BOC to amend its ONA Plan to describe new ONA services that will be technically possible with CCS7, ISDN, and IN technologies, and, if possible, how these services will be organized and offered to ESPs.[180]

a. BOC Amendments

i. ONA and CCS7

101. With minor exceptions, the BOCs confine their discussions of CCS7 to the so-called CLASS[181] services and CCS7 interconnection capabilities. Collectively, the BOCs state that CCS7 will enable them to offer nine CLASS services, five of which are responsive to initial ESP network capability requests identified by Bellcore. These nine CLASS services greatly increase the number of network-based features accessible to users: (a) *Automatic Callback* allows a calling party automatically to redial the last outgoing call from his or her line. If the called number is busy, the network will automatically attempt to redial the number periodically; (b) *Automatic Recall* allows the subscriber automatically to dial the telephone number of the most recent unanswered incoming call. As with automatic callback, if the redialed line is busy, the network will keep trying it periodically until a connection is made; (c) *Calling Number Identification via ICLID* enables the subscriber to receive the directory number of incoming calls at the time the calls are received; (d) *Calling Number Identification via BCLID* enables the subscriber to receive in bulk format the directory number of the calling party; (e) *Selective Call Rejection* enables customers to block incoming calls from certain telephone numbers; (f) *Selective Call Acceptance* enables subscribers to block all calls except those originating from specified directory numbers; (g) *Selective Call Forwarding* enables subscribers to forward automatically all calls originating from specified directory numbers; (h) *Distinctive Ringing* alerts customers via a special ringing pattern when calls are received from a specified list of directory numbers; and (i) *Customer Originated Trace* allows subscribers to initiate an automatic trace of the last call received.[182] The five CLASS services responsive to ESP requests are the two Calling Directory Number Delivery services, Selective Call Rejection, Selective Call Forwarding, and Distinctive Ringing.

102. The BOCs state that CCS7 interconnection will enable them to make available the benefits of CCS7 technology on an internetwork basis.[183] Only Ameritech, however, provides detailed information about its plans for deploying CCS7 interconnection capabilities. Ameritech states that it will equip six access tandems and 33 end offices with CCS7 interconnection by July 1, 1991, and five additional access tandems and 64 additional end offices during the next year. Bell Atlantic states that assuming that deployment and demand uncertainties can be resolved, deployment of CCS7 interconnection service could begin in early 1991. The other BOCs do not provide information on their plans for deploying CCS7 interconnection.

ii. ONA and ISDN

103. The BOCs state that in light of the cost and complexity of implementing ISDN,[184] they will introduce this technology in phases. They describe the current phase as characterized by a lack of international or national standards and limited compatibility of equipment provided by different vendors. They state that they will deploy ISDN only on a very limited individual case basis (ICB) or trial basis during this phase.[185]

104. The BOCs state that Bellcore issued the first generic requirements for a group of fifteen ISDN services, termed "Phase 1.1" services, in late 1988 and early 1989. The BOCs state that equipment based on these generic requirements should be available from vendors in 1990. Most of the BOCs discuss their ISDN plans for the next few years with reference to these Phase 1.1 services. The BOCs also describe briefly the next phase of ISDN deployment, Phase 1.2.[186] They claim that Bellcore will release generic requirements for Phase 1.2 services during 1989 and 1990 and that they anticipate that vendors will provide equipment for these capabilities in the 1991-93 time frame.[187] None of the BOCs claims to have made even tentative deployment plans for Phase 1.2 ISDN services.[188]

105. In addition to the Phase 1.1 and 1.2 ISDN services, some of the BOCs mention frame relay service as a possible future ISDN service.[189] The IILC has achieved consensus on the general technical aspects of providing this service, and the ECSA-sponsored T1 Committee is currently developing technical standards.[190] Although Ameritech states that frame relay is a priority item, the BOCs in general indicate they are currently only at the stage of evaluating market demand for this service.[191]

iii. ONA and IN

106. The BOCs discuss IN technology in their amended plans only in general terms.[192] They state that IN architecture will bring greater control and flexibility to the service development process and allow the BOCs to introduce new services much more quickly than is now possible.[193] In addition, they state that IN technology will reduce the expense associated with generic upgrades in large numbers of stored program controlled switches.[194] The BOCs state that plans for IN development have changed as more has become known about its technical feasibility, costs, and benefits, and that these plans are still very much in a state of flux, rendering specific service projections impossible. According to Pactel, Bellcore is expected to publish the first generic requirements for IN architecture in late 1992, and vendor offerings are expected in the 1994-1996 time frame. Before then, the BOCs may offer IN-type services with their CCS7 networks, but these services will depend on software generic releases for Stored Program Control switches and data bases with single-service applications, such as the 800 data base.[195]

107. Some of the BOCs identify IN-type services that they may offer prior to the implementation of the ultimate IN architecture.[196] However, there is virtually no consistency among the BOCs in the identification or description of these services. None of the BOCs commits to specific deployment dates for any of these services. Therefore, the amended plans provide little information about ONA services that might be generally available through IN technology in either the short or long term.

b. Positions of the Parties

108. Several parties express general concern about the BOCs' failure to provide specific information or commitments on the ONA services they will offer with CCS7, ISDN, and IN technology. For example, CBEMA/ADAPSO note that while the BOCs describe new services that might be technically possible with future technologies, the BOCs generally claim that decisions as to the availability of such services must await consideration of the BSE screening criteria of feasibility, utility, market demand, and cost.[197] Similarly, Tymnet argues that "[t]here are few deployment dates more specific than § 1991 - 1993 timeframe,' and there is little information on the degree of deployment contemplated for any of the

services based on SS7, ISDN or IN."[198] MCI claims that some of the BOCs have withheld meaningful information about their future deployment plans under the pretense that this information cannot be provided until industry standards are finalized, and that the BOCs will use future technologies only for services that the BOCs themselves can provide to end users.[199] MCI and Tymnet also fault the lack of uniformity among the BOCs with respect to new services.[200]

109. In addition to these general criticisms of the BOCs' future technology discussions, parties also offer specific criticisms focused on particular technologies or services. For example, MCI and AT&T criticize all of the BOCs except Ameritech for failing to provide deployment schedules for CCS7 interconnection.[201] EDS and Telenet argue that the BOCs description of future D channel access is inadequate, and EDS asks us to require the BOCs to offer D channel access as a BSE.[202] Telenet states that not one BOC indicates that it will offer X.75 access to ISDN central office switches as an initial ONA service, although it and other ESPs requested this functionality. Telenet asks us to require that the BOCs "remedy this deficiency" before approving the BOC plans.[203] Finally, some parties also express dismay at the lack of progress in defining and developing IN architecture. For example, CBEMA/ADAPSO state that certain carriers previously represented that deployment of Feature Node/Service Interconection technology could begin as early as 1988, and that there still are no industry standards for IN technology or even an industry agreement on a definition of the term.[204]

c. Discussion

110. We agree that the amended plans contain limited information on how future technologies, such as CCS7, ISDN, and IN, and services based thereon, will be made available to ESPs. Some parties assert that the BOCs have deliberately withheld important information about their plans regarding these technologies. It appears, however, that the dearth of information filed last year is due largely to the fact that specific plans for these technologies had yet to be made. For example, it appears that CCS7 interconnection plans were indefinite because vendors had not completed development of the necessary interfaces, and because the BOCs were negotiating price and delivery dates with switch vendors, including AT&T.[205] Likewise, standards and requirements for Phase 1.2 and beyond ISDN services had yet to be announced, and the industry had not agreed on a workable definition of IN, much less a final architecture. Thus, while we share the disappointment of those who had hoped that advanced technologies could be developed and implemented more quickly, we recognize that substantial planning and analysis is necessary before deployment decisions can be made.[206]

111. We note, however that significant progress appears to have been made in a number of these areas since the filing of the amended ONA plans.[207] We expect substantial further progress on these issues, especially those relating to CCS7 and ISDN, during the next year. Thus, in order to ensure and monitor continuing progress on these issues, we direct each BOC to amend its ONA plan on April 15, 1991 to describe, in significantly greater detail than its May 1989 Amendments, its specific plans for developing and implementing CCS7, ISDN, and IN technologies, including a description of (a) how it will unbundle these technologies and how generally these technologies will fit into the ONA framework, (b) ONA services that these technologies could support; and (c) its plans for offering such services.[208]

2. ESP Input Into the ONA Process

112. The *BOC ONA Order* noted that an important part of our ONA policy is to ensure an opportunity for ESPs and carriers, as well as other members of the communications industry, to work together in planning ways in which network designs promote an open, competitive, and efficient enhanced services marketplace. Accordingly, the Commission required each BOC to include in its ONA plan amendments evidence that it has incorporated into its network planning process an effective means of receiving input from ESPs regarding their future network needs and their use of advanced network technologies.[209]

113. The BOCs generally describe four broad avenues through which ESPs may provide input to the network planning process.[210] Each of the BOCs states first that it has established an ONA marketing team to act as a liaison to the ESP community and identify ESP network service needs.[211] A second vehicle for ESP input described by the BOCs is industry fora. The BOCs state that the IILC is a particulary effective vehicle for receiving ESP input, citing recent ESP workshops on Calling Number Identification (June 1988); Frame Relay (November 1988); Alarm Services (May 1989); as well as a Future Technologies workshop. The BOCs also name as additional fora for ESP input the North American ISDN User's Forum, the Videotex Industry Association, the Information Industry Association, and the Switch Features Forum, where the BOCs review and set priorities for new switch feature development.[212]

114. A third avenue described by the BOCs for ESP input is participation in the generic requirements development process. As described by the BOCs, generic requirements are usually developed in two stages. First, after the BOCs have described their need for a particular functionality to Bellcore, Bellcore drafts a Technical Advisory (TA). TAs are preliminary documents that include proposed generic requirements. They are distributed to interested parties free of charge,[213] and are open to public comment for approximately ninety days.[214] Bellcore may also hold a Technology Requirements Industry Forum ("TRIF") during the open comment period to facilitate the exchange of information and views on the TA.[215] At the conclusion of the open comment period, Bellcore reviews the comments and develops a Technical Reference ("TR") containing more finalized generic requirements.[216]

115. A fourth way for ESPs to provide input to the network development process, according to the BOCs, is through participation in standards-setting organizations, in particular, the T1 Committee and CCITT.[217] The BOCs state that standards work in these organizations is driven by the contributions of the various participants and that these organizations are open to all interested parties. The BOCs note that the T1 Committee is currently addressing Frame Relaying, and that at least three study groups within CCITT currently have Frame Relaying on their agendas.[218]

116. MCI claims that the means described by the BOCs for ESP input into the network planning process are merely "window dressing." The IILC, MCI claims, is of limited value, since participation in the IILC and compliance with its recommendations are purely voluntary. MCI

states that the ONA Template is too general to be of much use and that third party comments on proposed generics "are routinely ignored and sent to the 'round file.'"[219]

117. We approve the amendments relating to ESP input into the ONA process. The amendments describe a number of avenues by which ESPs may contribute to the BOCs' network planning process. These avenues include direct communication with the BOCs through BOC marketing teams, as well as through industry fora, including organizations like the IILC that have demonstrated significant ESP influence and progress. In addition, they include procedures enabling ESPs to provide input towards the development of generic requirements and industry standards.

118. MCI dismisses the significance of these avenues for input, claiming that the BOCs have no intention of relinquishing their decision-making authority in matters relating to new technologies and services. However, as stated in the *BOC ONA Order*, our requirement that the BOCs provide ESPs with the opportunity to offer input towards network planning is in no way intended to confer on ESPs the "final say" on the availability of network services.[220] Thus, MCI's criticism is misplaced.[221] Indeed, the BOCs have shown that there are ample opportunities for ESPs to offer input to the network development process. Moreover, the significant increase in the number of ONA services to be offered by the BOCs, as compared with the offerings described in the initial ONA plans, is evidence that ESPs are, in fact, taking advantage of these opportunities, and that the BOCs do incorporate ESP input received through these channels into their network planning decisions.

3. Deployment Schedules for Future ONA Services to be Offered Prior to July 1, 1992.

119. The *BOC ONA Order* stated that it appears that many future services contemplated by the BOCs will be available in generics the capabilities of which have already been announced to the BOCs by switch vendors, and that the BOCs may have made plans to deploy such generics. Accordingly, the Commission required each BOC to provide three-year deployment schedules, if feasible, for all ONA services not included in the BOC's initial set of services, but which the BOC plans to begin offering prior to July 1, 1992. In addition, it required each BOC to describe all ONA services that can be supported by generics that it has scheduled for deployment by July 1, 1992.[222]

120. The BOCs claim that they include, as feasible, in their three-year deployment schedules all ONA services that they currently plan to deploy by July 1, 1992, including those not in their initial set of services.[223] In addition, most of the BOCs describe ONA services that they do not include in their deployment schedules, but which they state would be technically feasible with new generics that they have scheduled for deployment by July 1, 1992.[224] NYNEX, for example, identifies more than ten potential future ONA services, Pactel and Ameritech five, US West four, and SWBT two. Bell Atlantic, on the other hand, does not say whether new generics in its deployment plans could support additional ONA services.

121. Telenet, the only party to comment on this aspect of the BOCs' Amended Plans, criticizes Bell Atlantic for declining to provide future deployment information. Telenet states that Bell Atlantic should be required to amend further its plan to include this information.[225]

122. Although all of the BOCs appear to provide, to the extent feasible, projections for future ONA services to be deployed prior to July 1, 1992, Bell Atlantic did not respond to our requirement that each BOC also describe future services that would be technically possible with new switch generics that the BOC has scheduled for deployment. Accordingly, we require Bell Atlantic to amend its ONA plan by July 15, 1990 to satisfy this requirement. Of course, all BOCs will have to annually update their three-year deployment schedules.

C. Responding to Future ESP Requests for New ONA Services

123. The *BOC ONA Order* stated that while the Commission was generally satisfied with the preparations that the BOCs had made for dealing with specific requests for new ONA services, only Ameritech committed to respond to such requests within a specific, reasonable period of time. Accordingly, it required each of the other BOCs to amend its procedures for responding to future ESP requests for new ONA services to mirror those of Ameritech.[226]

124. All BOCs now state that, like Ameritech, they will respond to each ESP request for a new ONA capability within 120 days after receiving a complete written request for such capability. In addition, all of them state that their responses will describe whether they will provide the capability, and, if so, when and at what price, assuming actual demand meets ESP estimates. Each BOC also states that its response will describe any technical problems it anticipates. Each of the BOCs also describes its criteria for determining when an ESP request for a new ONA capability is complete or, alternatively, attaches a form to its amended plan that ESPs can use for future service requests.[227] None of the commenters address the BOC amendments on this issue, and we approve this aspect of each BOC's amended plan.[228]

XI. OTHER NONSTRUCTURAL SAFEGUARDS

A. Use of Customer Proprietary Network Information

1. Information to be Treated as CPNI

125. The *BOC ONA Order* stated that CPNI includes, with minor exceptions, all information about customers' network services and customers' use of those services that a BOC possesses by virtue of its provision of network services.[229] The Commission found that most of the CPNI definitions proposed by the BOCs were consistent with this standard, although some of those definitions were incomplete. Accordingly, the Order required that: (a) Pactel amend its CPNI definition to include billing information for each network service a customer uses; and (b) all BOCs except Pactel and Ameritech amend their definitions to include usage data and information on customer calling patterns.[230]

126. Pactel states that it has revised its definition of CPNI to include billing data, while Bell Atlantic, BellSouth, NYNEX, SWBT, and US West state that their amended definitions include usage data and information

on customer calling patterns.[231] However, the ONA Users Group contends that each BOC should consolidate its definition of CPNI into one filing because of the difficulty of tracing the CPNI definitions as they have evolved in response to Commission requirements.[232]

127. We find that the affected BOCs have complied with these directions in the *BOC ONA Order* and that their amended definitions of CPNI are in compliance with our CPNI standards. However, we agree with the ONA Users Group that it would be useful for the BOCs to consolidate their CPNI definitions into a single document. Accordingly, we require each BOC to amend its ONA plan by July 15, 1990, to provide a consolidated definition of CPNI.

2. Conditions of Release of CPNI to Unaffiliated ESPs

128. While all of the BOCs stated in their original ONA plans that they will release CPNI, pursuant to a customer's request, to unaffiliated ESPs, Ameritech, BellSouth, NYNEX, and Pactel failed to state that they will make CPNI available to unaffiliated ESPs on the same terms and conditions that they make CPNI available to their own enhanced services operations. The *BOC ONA Order* found this a "fundamental aspect" of our CPNI rules, and required the four BOCs to amend their plans.[233] Ameritech, BellSouth, NYNEX, and Pactel now indicate that they will release CPNI information to an unaffiliated ESP under the same terms and conditions that they will apply to their own enhanced services operations.[234] None of the commentors address these amendments, and we find that they comply with our requirements.

3. Procedures for Restricting BOC Access to CPNI

129. The *BOC ONA Order* concluded that a password/ID system as proposed by NYNEX is the preferred method for restricting CPNI access for enhanced services personnel and should be used by the BOCs for that purpose, absent a specific showing that it would be unduly burdensome for them to do so.[235] Accordingly, it required each of the other BOCs to amend its CPNI plan to incorporate a password/ID system comparable to that proposed by NYNEX. The *BOC ONA Order* stated, however, that a BOC may implement an alternative system to the extent that it demonstrates that a password/ID system is not feasible in particular end offices or for particular data bases.[236]

130. Each of the BOCs now proposes to implement a password/ID system or prevent logon access for its major marketing support databases. However, the BOCs vary in their treatment of certain auxiliary databases that are not routinely accessed by marketing personnel. For instance, Bell Atlantic states that it will implement a password/ID system on two databases containing CPNI that provide primary on-line support to marketing personnel.[237] However, Bell Atlantic declines to institute password/ID systems for several other databases that support Bell Atlantic's Customer Service Centers, stating that personnel in these centers will primarily handle requests for basic network services and billing, rather than marketing of enhanced services.[238] Bell Atlantic argues that imposing password/ID restrictions on personnel in these centers would inconvenience customers by creating a situation in which customers with restricted CPNI would be told to speak with another representative for basic services. Bell Atlantic does not specify which, if any, of its other databases with CPNI are routinely accessed by enhanced services personnel.[239]

131. BellSouth states that it has incorporated into its CPNI plans a password/ID system comparable to the system proposed by NYNEX.[240] However, BellSouth notes that it will not apply password-restricted access to its service order processing system.[241] BellSouth argues that to implement a password/ID system for the service order processing system would cost over $500,000 and is economically impractical. BellSouth further maintains that it will administratively restrict enhanced services personnel from access to other databases containing restricted CPNI, but it does not clarify whether these databases are routinely accessed by enhanced services marketing personnel.[242]

132. Pactel states that its proposed password/ID system will apply to primary customer support systems and systems used to access those support systems. However, Pactel notes that it will not implement a password/ID system for a number of other databases that contain some CPNI and are used for routine provisioning, servicing, maintenance and billing activities and procedures.[243] Instead, Pactel states that it uses training, administrative rules and other safeguards to ensure that its enhanced services personnel do not use CPNI from these systems. Similarly, Ameritech proposes to establish a password/ID system to limit access to its "support system data base." However, it will not impose password/ID for all databases. For these other databases, manual records, and microfiche, Ameritech proposes to limit access "administratively" to enhanced services marketing personnel. Finally, Ameritech plans to provide training regarding disciplinary action for disclosure of restricted CPNI to all personnel having access to customer records.

133. SWBT states only that it has established a password/ID system to deny its enhanced services marketing personnel access to restricted CPNI in its systems providing order retrieval and distribution, billing and order support, terminal access and marketing, marketing information and analysis, and customer query responses.[244] NYNEX and US West state that they have developed, or implemented, password/ID security for, or denied logon access to their major databases, but do not discuss their other databases containing CPNI.[245]

134. The Ameritech States contend that Ameritech complies with our requirements by committing to implement a password/ID system comparable to that planned by NYNEX.[246] However, MCI and ONA Users Group express concern that BOC databases without password/ID systems that contain restricted CPNI constitute a significant loophole in our CPNI procedures. MCI argues that BellSouth has restricted such access and that other BOCs should make similar commitments.[247] In addition, ATSI argues that we should require Bell Atlantic and Pactel to extend the password/ID system to additional databases containing CPNI or, if that is infeasible, to develop other procedures to preclude access to restricted CPNI by enhanced services marketing personnel.[248]

135. Each of the BOCs proposes to implement a password/ID system or otherwise restrict logon access for certain databases routinely accessed by enhanced services marketing personnel. Likewise, none of the BOCs propose to implement password/ID systems for certain databases that are not routinely accessed by enhanced services personnel.

136. We find that the password/ID systems described in the BOC plans are adequate for the databases to which they apply.[249] Likewise, we will not require that the BOCs implement password/ID systems for auxiliary databases that contain fragmented CPNI and are not routinely accessed by enhanced services marketing personnel. Such databases are not generally accessible to marketing personnel, and the fragmented CPNI available in these databases is not in a form useful to marketing personnel. Thus, it appears that these auxiliary databases have little value to marketing personnel for sales activities. Moreover, it is costly for the BOCs to implement password/ID systems for auxiliary databases. Since we believe the cost of implementing password/ID systems for auxiliary databases outweighs the benefits, we will allow the BOCs to develop training programs and disciplinary safeguards to limit access and use of restricted CPNI in auxiliary databases.

137. Although it appears that the major databases used by marketers are covered by password/ID systems, we want to ensure greater consistency in defining the databases that must be subject to such restrictions. For instance, some BOCs have implemented password/ID systems for their service order processing systems, while others consider these systems to be auxiliary and have established training and disciplinary safeguards to restrict access. The matter is complicated by the fact that the BOCs have many databases containing CPNI, and there is little consistency in the names for these databases. Accordingly, we require the BOCs to apply password/ID systems to all primary databases that are routinely accessed by the BOCs' enhanced services marketing personnel and contain comprehensive restricted CPNI. We also require the BOCs to file amended ONA plans by April 15, 1991, stating, for each database without password/ID protection that contains CPNI: (a) database name; (b) purpose; (c) accessibility and frequency of use by enhanced services marketing personnel; (d) types and amount of CPNI; (e) method of access restriction; and (f) justification for not imposing password/ID restrictions.[250]

4. CPNI Procedures for Restricting Call Forwarding

138. In their original ONA plans, the BOCs, except for Pactel, attributed CPNI to the customer that is billed for a service and gave the customer sole authority to restrict the use of CPNI. The *BOC ONA Order* expressed concern, however, that customers of some enhanced service providers (*e.g.*, voice-messaging service) routinely forward their calls to ESPs, and that the release of the forwarded-to number in these circumstances reveals an ESP's customer to a BOC. The *BOC ONA Order* recognized that ESPs as well as customers may have a special interest in restricting this kind of information, and approved Pactel's plan to allow ESPs to restrict such information. Likewise, the Commission approved Bell Atlantic's plan to protect this information by deleting the forwarded-to number from its CPNI databases. The *BOC ONA Order* required each BOC except Pactel and Bell Atlantic either to delete the forwarded-to number from databases used for CPNI access or otherwise to restrict access by its enhanced services personnel.

139. Ameritech, BellSouth, NYNEX, SWBT, and US West now propose to either delete forwarded-to numbers from databases used by their enhanced services personnel or otherwise restrict access to the forwarded-to number.[251] None of the commentors challenge the adequacy of the BOC amendments in this area, and we find that they comply with our requirements.

5. Restriction of CPNE by Residential and Single Line Business Customers

140. *The BOC ONA Order* required that SWBT amend its plan to clarify that, like the other BOCs, it will permit residential and single line business customers to restrict their CPNI from access by SWBT enhanced service personnel.[252] SWBT claims that it has implemented procedures to satisfy this requirement,[253] and none of the commentors addressed this issue. We find SWBT's amendment to comply with our requirement.

6. Aggregate CPNI

141. The *BOC ONA Order* required Ameritech and Pactel to amend their plans to describe how they will comply with our requirements for notifying ESPs of the availability of aggregate CPNI.[254] Ameritech states that it will use seminars, letters and enhanced service industry newsletters to notify interested parties of the availability of aggregate CPNI. Pactel states that it is notifying ESPs about the availability of aggregate CPNI through annual direct mailings. No commentors addressed the amendments, and we find that they comply with our requirements.[255]

7. Temporary and Partial Retriction of CPNI

142. The *BOC ONA Order* required SWBT and NYNEX to amend their CPNI plans to clarify that, like the other BOCs, they will honor requests for temporary restrictions on CPNI.[256] NYNEX and SWBT made the requisite clarifications in their amended plans,[257] and we approve the clarifications.[258] In addition, we clarify that, in their next annual notification, BOCs must inform customers of their right to restrict the release of CPNI on one or more accounts of a multiple account.[259]

8. CPNI Notices and Response Forms

143. The *BOC ONA Order* found that annual CPNI notices filed by the BOCs in response to the *Second BOC CPE Plans Order* are satisfactory in all respects and should be adapted for use in the enhanced services context.[260] Accordingly, it directed the BOCs to use these notices and forms, as adapted, for enhanced services purposes. Several commentors argue that the BOCs' customer notification and response forms should be revised because the forms are either unclear or provide an advantage to the BOCs. For instance, MCI argues that the NYNEX notification letter is unfocused and incomplete, while Pacific Bell's notice is readable and informative.[261] Telenet argues that the BOCs do not provide an option on the notification form for customers to limit access to BOC affiliates to a subset of their CPNI, but provide such an option for customers of unaffiliated ESPs.[262]

144. The *BOC ONA Order* declined to order specific wording for the BOC customer notification and response forms, thereby providing flexibility for the BOCs to develop letters consistent with their operations.[263] The Order required the BOCs to adapt their approved CPE CPNI notification and response forms for enhanced services purposes, and Bureau staff reviewed individual BOC no-

tification letters when they were developed. Accordingly, we find no need to generally revisit the notification letters at this time.[264]

B. Nondiscrimination in Installation and Maintenance

1. Bell Atlantic Procedures for Preventing Quality Based Discrimination

145. *The BOC ONA Order* found that, unlike the other BOCs, Bell Atlantic did not demonstrate that it has mechanized procedures for assigning equipment and facilities to its customers, or that its systems are blind to the identity of a customer ordering a service. The *BOC ONA Order* therefore required Bell Atlantic to amend its plan to demonstrate that it lacks the ability to discriminate in the quality of circuits it assigns. Bell Atlantic now clarifies that, like the other BOCs, it generally uses mechanized systems that randomly assign circuits to its customers without reference to the identity of the customer.[265] None of the commentors address this issue, and we therefore remove Bell Atlantic's quality-based reporting requirement. Like the other BOCs, Bell Atlantic must now file an annual affidavit attesting that it has followed the installation procedures described in its plan, and that it has not discriminated in the quality of services it has provided.

2. Installation and Maintenance Procedures of US West and Bell Atlantic

146. The *BOC ONA Order* found that US West had not demonstrated that its installation and maintenance procedures largely preclude it from discriminating on the basis of the identity of the ordering customer, and in the timeliness of service installation and maintenance.[266] Unlike the other BOCs, US West did not state that its due dates are generally standardized and did not describe the criteria by which it assigns due dates. In addition, the Commission required Bell Atlantic to clarify in its ONA Amendments that it instructs its employees that they may not discriminate either in favor of Bell Atlantic's enhanced service operations or against other ESPs in their network service functions.

147. US West now states that it assigns due dates for routine installation orders based on standard intervals for the types and quantities of services required. US West also states that its personnel apply those standards consistently without discriminating between customers who order the services. In addition, US West claims that it follows standard maintenance intervals that are based on the types of trouble involved, without regard to the customer's identity.[267] Bell Atlantic responds that it provides employees with a copy of its nondiscrimination instructions. These instructions state that any employee giving preferential treatment to a Bell Atlantic affiliate and/or discriminating against an enhanced service provider will be subject to disciplinary action. Bell Atlantic also states that this nondiscrimination statement has been incorporated into Bell Atlantic's Employee Personal Responsibility brochure.[268] No commentors address these amendments. On the basis of these amendments, US West and Bell Atlantic will be subject to the same requirements in this area as the other BOCs.[269]

3. BOC Installation and Maintenance Report Formats

148. Each BOC argues that the requirement that they provide information on their installation and maintenance of BSEs and CNSs is onerous and unnecesary. Six of the BOCs have sought reconsideration of that requirement. In our companion *BOC ONA Reconsideration Order*, we modify the required format for installation and maintenance reports. We therefore require all BOCs to file on July 15, 1990, amendments to their installation and maintenance reporting plans consistent with that order.

XII. CONCLUSION

149. The following is a summary of requirements established in this order that the BOCs must satisfy:

A. Amendments Due July 15, 1990:

(1) BellSouth, SWBT, and US West must amend their plans to delete any "blanket letter of agency" requirements for ESPs that order CNSs on behalf of their customers.

(2) Pactel must amend its initial deployment schedule as directed.

(3) Bell Atlantic must amend its plan to describe future services that are technically possible with new switch generics that is has scheduled for deployment.

(4) Each BOC must amend its plan to provide a consolidated CPNI definition.

(5) Each BOC must amend its plan to provide its proposed installation and maintenance report in compliance with the revised requirements of the BOC *ONA Reconsideration Order*.

B. Amendments Due April 15, 1991:

(1) All BOCs using classifications other than BSA, BSE, CNS, or ANS must amend their plans to eliminate these classifications.

(2) Each BOC must work through the IILC and amend its plan to clarify the specific information that it will make available to ESPs to allow them to bill for their services, as well as develop solutions for delivering CNI, or possible CNI alternatives, to ESPs that purchase line-side connections.

(3) Each BOC must provide updated information on its OSS planning and implementation, and provide information concerning additional progress on the uniform provision of OSS.

(4) Each BOC must amend its plan to reflect any subsequent developments in the IILC reflecting procedures for providing confidentiality for ESPs' proprietary information.

(5) Each BOC must amend its plan to reflect progress on resolution of technical uniformity issues.

(6) Each BOC must amend its plan to reflect any additional progress at the IILC on the Cross Reference Guide.

(7) Each BOC must amend its plan to reflect progress on long-term uniformity issues.

(8) Each BOC must amend its plan to include copies of effective state tariffs for ONA services and to provide an explanation of the ratemaking methods that it employed in computing these tariffs.

(9) Each BOC must amend its plan to: (a) list all ONA service requests that it received from ESPs during the previous year, and the disposition of such requests; and (b) identify progress on developing ONA capabilities responsive to ESP service requests previously deemed technically infeasible.

(10) Each BOC must amend its plan to describe its plans established since its previous amendments for developing and implementing CCS7, ISDN, and IN technologies, including a description of: (a) how it will unbundle these services provided through the use of such technologies and generally how those services will fit into the ONA framework; (b) ONA services that these technologies could support; and (c) its plans for offering such services.

(11) Each BOC must amend its plan to apply password/ID systems to all primary databases that are routinely accessed by enhanced services marketing personnel and contain comprehensive restricted CPNI. Each BOC must also amend its plan to describe for each database containing restricted CPNI that it does not propose to implement password/ID restrictions the following: (a) database name; (b) database purpose; (c) accessibility and frequency of use by enhanced services marketing personnel; (d) types and amount of CPNI; (e) method of access restriction.

(12) Each BOC must amend its plan to list all BSEs that it uses for its own enhanced service operations.

(13) Each BOC must amend its plan to address competitive equity and informed customer choice issues in implementing CPNI requirements. [270]

C. Notice Required for Lifting of Structural Separation

(1) Each BOC must file a notice that it (a) is technically prepared to offer each of its initial ONA services; (b) has effective federal tariffs for interstate ONA services; and (c) has filed state tariffs for intrastate ONA services.

XIII. ORDERING CLAUSES

150. IT IS HEREBY ORDERED, that pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, 214, 218, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 205, 214, 218, and 405, and 5 U.S.C. § 553, the ONA plans of Ameritech, Bell Atlantic, BellSouth, NYNEX, Pactel, SWBT, and US West ARE APPROVED, subject to the conditions described herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy,
Secretary

APPENDIX A

BOCs Filing ONA Amendments

Ameritech Operating Companies (Ameritech)

Bell Atlantic Companies (Bell Atlantic)

BellSouth Corporation (BellSouth)

NYNEX Telephone Companies (NYNEX)

Pacific Bell, Nevada Bell, Pactel Communications Companies, and Pacific Telesis (Pactel)

Southwestern Bell Telephone Company (SWBT)

US West, Inc. (US West)

Parties Filing Comments

Alarm Industry Communications Committee (AICC)

Illinois Commerce Commission, Indiana Utilities Regulatory Commission,

Michigan Public Service Commission, and the Public Utilities Commission of Ohio (Ameritech States)

American Telephone and Telegraph Company (AT&T)

Computer and Business Equipment Manufacturers Association/Association of Data Processing Service Organizations (CBEMA/ADAPSO)

Coalition of Open Network Architecture Parties (CONAP)

Dun & Bradstreet

Electronic Data Systems (EDS)

International Communications Association (ICA)

MCI Telecommunications Corporation (MCI)

Northern Telecom

California Bankers Clearing House Association, Committee of Corporate Telecommunications Users, Mastercard International Inc., New York Clearinghouse Association (ONA Users Group)

Kansas Corporation Commission, Missouri Public Service Commission,

Arkansas Public Service Commission (SWBT States)

Telenet Communication Corporation (Telenet)

Tymnet-McDonnell Douglas Network Systems Company (Tymnet)

Western Union Corporation (Western Union)

Parties Filing Replies

AT&T

Ameritech
Association of Telemessaging Services International, Inc.
(ATSI)
Bell Atlantic
BellSouth
CONAP
EDS
ICA
IDCMA
Information Industry Association (IIA)
National Telecommunications and Information Administration (NTIA)
NYNEX
ONA Users Group
Pactel
SWBT
US West

Parties Filing Informal Comments

AccessPlus Communications (AccessPlus)

APPENDIX B

IILC ISSUES STATUS
(as of February 22, 1990)

ISSUE NUMBER	STATUS	ISSUE TITLE
001-TWC	R	Uniform Provision of Calling Number Identification (See No. 017-TWC, below)
002-TWC	R	CPNI Availability
003-TWC	R*	ESP Access to BOC Operations Support Systems (OSS)
004-TWC	R	InterLATA Transport of ONA Services
005-NTWC	A	Availability of State ONA Tariff Filings
006-NTWC	A*	Maintenance of the ONA Plan Reference Document
007-NTWC	R*	Guidelines and Principles of Uniformity
008-TWC	R*	ESP/User Initiated Diagnostics via Symmetric Peer to Peer Protocols (incorporated into 003-TWC)
009-NTWC	W	Uniform Non-Geographic Number Access to ESP Services
010-TWC	R	ESP Frame Relaying Access to ISDN Customers (reviewed annually using input from ECSA T-1 Committee).
011-NTWC	A	Uniform Nationwide Access Numbers for ESP Services
012-TWC	R	Ability to Detect Breaks in Telco Line within 60 Seconds
013-NTWC	A*	Protection of ESPs' Proprietary Demand Information
014-TWC	A	Direct ESP Packet Connection to ISDN End Office
015-TWC	A*	Information (and mechanisms for delivery) Required for ESP Billing Operations
016-TWC	A*	ESP Input to the BOC Network Planning Process
017-TWC	A	Uniform Delivery of Line Side CNI in Near Future
018-TWC	R	Ability to Control CNI Delivery (the privacy issues)
019-TWC	A	Computer-Telecommunications Switch Call Control
020-TWC	W	Sub-rate Multiplexing for Data Over Voice (DOV)
021-NTWC	A*	Systematic Approach to Uniformity of ONA Services
022-NTWC	A*	Unbundling Criteria (Fundamental Unbundling)
023-NTWC	W	Estimating Market Demand
024-NTWC	R	Calling Party Identification Anonymity/Privacy

Legend:
A: Active
*: Reflecting response to *BOC ONA Order*
R: Resolved (approval by full IILC)
W: Withdrawn due to lack of participants

Source: IILC Secretariat

APPENDIX C[1]

INITIAL DEPLOYMENT OF ONA OFFERINGS
(Comparison of Original and Amended ONA Plans)

Table 1

of NCs Deployed by Each BOC
(Deployed & % of Total)[2]

	2/1/88 ONA Plans	As Amended
Ameritech	55 (47%)	76 (64%)
Bell Atlantic	58 (49%)	76 (64%)
Bell South	56 (47%)	71 (60%)
NYNEX	53 (45%)	56 (47%)
Pactel	54 (46%)	73 (62%)
SWBT	49 (41%)	62 (52%)
US West	54 (46%)	79 (66%)
AVERAGE PER BOC	54 46%)	70 (60%)

Table 2

Number of NCs Available in Regions (Available, % of Total)

2/1/88 ONA Plans (#, % of Total)	As Amended (#, % of Total)	% Increase
All 7 Regions.29 (24%)	37 (31)	28
6 of 7 Regions.12 (10%)	26 (22%)	108
5 of 7 Regions.5 (4%)	11 (9%)	120
4 of 7 Regions.6 (5%)	1 (1%)	decrease
3 of 7 Regions 10 (8%)	3 (2%)	decrease
2 of 7 Regions 9 (8%)	1 (1%)	decrease
1 of 7 Regions 10 (8%)	7 (6%)	decrease
0 of 7 Regions 37 (31%)	32 (27%)	decrease
Total NCs 118	118	

APPENDIX D

Additional Services Proposed in Amendments

The following information reflects additional services proposed by several BOCs as part of their initial ONA service offerings following their Examination of other BOCs' ONA plans. The three BOCs that are not included in this Appendix also augmented their service offerings, but did not list their additional initial ONA services by Network Capability (NC) designations.

Ameritech:

NC #17 (Remote Activation of Custom Calling Services); NC #20 (Derived Local Channels [Alarm Monitoring]); NC #21 (Screening); NC #24 (Uniform Abbreviated Dialing); NC #28 (CLASS Features Interoffice); NC #32 (Access to Extended Superface Data Channel); NC #35 (Answer Supervision on the Line Side); NC #39 (Selected Number Reverse Billing, Rate Period Specific); NC #43 (Interconnection for Specialized Terminal Equipment); NC #46 (Statistical Multiplexer at CO); NC #58 (Compatibility to Existing Terminals); NC #61 (Equal Access to Exchange Network Switching & Transmission); NC #68 (Derived Channels that Comply wth UL and NFPA); NC #69 (One Way Alarm Transport); NC #80 (Multiple Monitors Per Loop); NC #81 (Clear Access to Date Portions of Derived Channels); NC #82 (Distinctive Ringing); NC #83 (4-Wire Interconnection/Switching); NC #84 (Access to Clear Channel Transmission); NC #90 (Automatic Disablement Call Waiting Tone during Dial-up Data Call); NC #94 (Tone to Digital Translation) NC #109 (Delivery of Traveling Class Marks).

NYNEX:

NC #20 (Hot Line); NC #21 (Warm Line); NC #22 (Remote Access to Call Forwarding -- Variable); and NC #23 (DS3-DS-1 Multiplexing).

SWBT:

NC #7 (Call Forwarding with Screening); NC #17 (Call Forwarding with Remote Activitation); NC #21 (Selective Call Rejection); NC #27 (Multiline Hunt Group); NC #28 (CLASS Features Interoffice); NC #46 (Multiplexing-- StatMux at CO); NC #82 (Distinctive Ringing); NC #90 (Call Waiting Tone Disablement); NC #104 (Recorded Announcements); NC #11 (Warm Line). *Id.* The underlying analysis is contained in App. 1B of the SWBT Amendments.

US West :

NC #7 (Call Forwarding with Call Screening); NC #11 (Customer Control of CFBL); NC #17 (Remote Activation of Customer Calling Services); NC #21 (Screening); NC #35 (Answer Supervision, Line Side); NC #39 (Selected Number Reverse Billing); NC #41 (Ability to Notify or Interrupt a Customer; NC #42 (Ability to Return Held Call to Customer); NC #66 (Provision of BOC Network Status Information); NC #82 (Distinctive Ringing); NC #84 (User Initiated Diagnostics) NC #89 (Automatic Disabling of Call-Waiting Tone); NC #100 (Remote Speed Call Menu Access Translator); NC #103 (Real Time Network Usage Data); NC #104 (Central Office Announcements); NC #107 (Billing Number Delivery).

APPENDIX E

ONA Services from New Network Technologies

ONA and CCS7

The BOC discussions of ONA services resulting from the implementation of CCS7 technology focus on "Custom Local Area Signaling Service" (or "CLASS") services. The BOCs vary somewhat in their plans for deploying CLASS services, presumably because they differ in their plans for equipping end offices with CCS7 capabilities. NYNEX states that it will deploy interoffice CLASS service in the 1990-91 timeframe, but it specifies neither the specific CLASS services that it will offer nor a deployment schedule. [3] BellSouth and US West state that by July 1, 1990, they will offer each of the above-listed CLASS services except Selective Call Acceptance.[4] US West indicates that it will deploy Selective Call Acceptance on a limited basis by July 1, 1991.[5] Bell Atlantic states that it will offer seven of the above-listed CLASS services (excluding Selective Call Acceptance, and Calling Number Delivery via BCLID) as initial ONA services.[6] Pactel projects deployment in the Los Angeles and San Francisco LATAs of the same seven services by July 1, 1991.[7] Ameritech states that it will offer five CLASS services by July 1, 1990, and that it views two others as potential future services.[8] Finally, SWBT projects extremely limited deployment of four CLASS services during the 1990-92 time frame, but does not describe its deployment plans with respect to the other services.[9]

ONA and ISDN

The BOCs state in their amendments that they will introduce ISDN services in phases corresponding to the phased implementation of ISDN technology.[10] The Phase 1.1 services include basic bearer services (such as call setup and disconnect) and fourteen supplementary services. These supplementary services are: (a) ISDN Automatic Callback and Monitor; (b) ISDN Call Forwarding; (c) ISDN X.25 Supplementary Services; (d) Flexible Calling for Managing Multiple Independent Calls; (e) ISDN Feature-Common Channel Signaling; (f) ISDN Basic Business Group Structure; (g) ISDN Business Group Dial Access Services; (h) ISDN Hold Capability; (i) ISDN

Multiline Hunt Group; (j) ISDN Call Pickup; (k) ISDN Electronic Key Telephone Service; (l) Additional Call Offering for Managing Multiple Independent Calls; (m) ISDN Calling Number Identification; and (n) User-to-User Signaling with Call Control.[11]

BOC deployment plans for these services vary by company. Ameritech, for example, states that, based on utility, technical feasibility, and cost projections, it has identified eight Phase 1.1 supplementary services as having potential as future ONA offerings.[12] Ameritech states that it will deploy these services in 65 end offices (representing .38% of its access lines) by the end of 1990. Similarly, Bell Atlantic states that, assuming the timely availability of equipment for Phase 1.1 services, it will begin deploying nine of these services on an intraoffice basis in 84 specified wire centers by year-end 1990.[13] US West, Pactel, SWBT, and BellSouth also cite various Phase 1.1 services as potential ISDN offerings, while stating that they have not yet made deployment decisions for these services.[14]

The BOCs discuss Phase 1.2 ISDN deployment in somewhat varying terms. The most expansive discussion is that of Ameritech, which states that Bellcore was expected to release preliminary requirements for eight Phase 1.2 services by year-end 1989. The eight Phase 1.2 services identified by Ameritech are: (a) ISDN Message Service; (b) ISDN Call Control Display Service; (c) ISDN Display-for Supplementary Services; (d) Message Detail Recording; (e) ISDN Multiswitch Business Group Services; (f) ISDN Screen List Editing; (g) ISDN Channel Switching; (h) and Interswitch Support for ISDN Call Hold, Call Forwarding; and Automatic Callback.[15] By contrast, US West identifies only seven services, Pactel six, BellSouth five, Bell Atlantic four, and SWBT one.[16]

ONA and IN

A number of the BOCs describe in very general terms some of the network capabilities that might be technically feasible in an IN environment. For example, Pactel lists nine such capabilities: (a) Network Automatic Call Distributor; (b) Private Virtual Network; (c) Multimedia Services; (d) Video Telephone Services; (e) Follow-me Services; (f) Virtual Foreign Exchange Service; (g) Selective Call Management; (h) Customer Controlled Network Services; and (i) Automatic Activation of Expanded Trunk Group Make Busy.[17] SWBT cites the first two of the services listed above as possible new services under IN, along with gateway services supporting user access to third party information providers.[18] Bell Atlantic states that the Intelligent Network may support "Origination-Based Routing" and "Remote Access to Private Network."[19] BellSouth identifies fourteen services requested by ESPs that could theoretically be provided in an IN environment.[20]

Some of the BOCs identify IN-type services they may offer before implementing the ultimate IN architecture. For example, BellSouth names seven services that it is evaluating for near-term deployment (at least one of which, Selective Call Acceptance, is a CLASS service), while Ameritech cites five different services that it might deploy by 1991. BellSouth also identifies eleven ESP requests that it might be able to accommodate by 1993 with IN capabilities, but the requests do not seem to relate to any of the services identified as potential IN services by Ameritech. Thus, it appears from the Amendments that BellSouth and Ameritech have completely different short-term IN plans in mind.[21] NYNEX also describes two potential short-term IN services, but these are different from the services cited by either BellSouth or Ameritech.[22] Finally, SWBT states that it may deploy a limited set of IN services in the early 1990s but it does not identify those services.[23]

FOOTNOTES FOR APPENDIX

[1] Sources: Commission Staff Analysis; *BOC ONA Order* 4 FCC Rcd at 288, App. D; *BOC Special Report No. 5* (ONA Services Cross Reference Guide); Pactel Reply at 38.

[2] "Total" refers to the list of 118 NC requests tabulated in Appendix B of the *Cross-Reference Guide*.

[3] NYNEX Amendments at 17.

[4] *See* BellSouth Amendments at Attachment G; US West Amendments at 149-150 and App. G. *See also* letter from Gary J. Dennis, Director-Federal Regulatory, BellSouth, to Donna Searcy, Secretary, Federal Communications Commission, dated October 3, 1989.

[5] *Id.*

[6] Bell Atlantic Amendments at 20 and App. I.

[7] Pactel Amendments at 50 and App. EE.

[8] Ameritech's five near-term CLASS services are Selective Call Rejection, Distinctive Ringing, Customer Originated Trace, Automatic Callback, and Automatic Recall. *See* Ameritech Amendments at 131-33 and App. 8 at 113. The two potential future services are Selective Call Forwarding and Calling Number Delivery.

[9] Those four services are Selective Call Rejection, Distinctive Ringing, Automatic Callback, and Selective Call Forwarding. SWBT Amendments at 23-26 and App. 3. SWBT states that Calling Directory Number Delivery may be available in the future as an ISDN Phase 1.1 service. *Id.* at App. 1B and 3.

[10] NYNEX, however, does not refer to Bellcore's generic requirements or the various phases of ISDN implementation in its plan. NYNEX identifies Answer Supervision, Calling Number Identification, Digital Connectivity, and Delivery of Dialed Number as potential ISDN ONA-related services. It states that it will conduct ISDN trials during 1989 and 1990 and that further deployment plans will follow completion of these trials. NYNEX Amendments at 17, 22.

[11] *See* Ameritech Amendments at 138; BellSouth Amendments at Att. J, pp. 7-10. For a description of these services see BellSouth Amendments, *supra;* Ameritech Amendments at 138-141; and Bell Atlantic Amendments at App. L.

[12] These eight services are: (a) ISDN Call Forwarding; (b) ISDN X.25 Supplementary Services; (c) Flexible Calling; (d) ISDN Hold Capability; (e) ISDN Multiline Hunt Group; (f) Additional Call Offering; (g) Calling Number Identification; (h) and User-to-User Signaling with Call Control. Ameritech Amendments at 138-140.

[13] These nine services include seven of the eight Ameritech services (excluding User-to-User Signaling with Call Control), plus ISDN Automatic Callback and ISDN Electronic Key Telephone Service. Bell Atlantic Amendments at 21-22.

[14] *See* US West Amendments at 150-51; Pactel Amendments at 46-49; BellSouth Amendments at Attachment J, pp. 6-10; and SWBT Amendments at App. 5A.

[15] Ameritech Amendments at 141.

[16] *Compare* Ameritech Amendments at 141; US West Amendments at 151; Pactel Amendments at 47-48; BellSouth Amendments at Att. J, pp. 11-12; Bell Atlantic Amendments at 22; and SWBT Amendments at App. 5A. Again, NYNEX does not discuss the ISDN phases at all.

[17] *See* Pactel Amendments at 53 and App. GG, pp. 25-32.

[18] SWBT Amendments at 24.

[19] Bell Atlantic Amendments at 23-24.

[20] BellSouth Amendments at Att. J, pp. 5-6.

[21] *See* BellSouth Amendments at Att. J, pp. 3-4; Ameritech Amendments at 149-52.

[22] *See* NYNEX Amendments at 18.

[23] *See* SWBT Amendments at 24.

FOOTNOTES

[1] Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988) (*BOC ONA Order*), *order on reconsideration*, CC Docket No. 88-2, Phase I, FCC No. 90-134 (released May 8, 1990) (*BOC ONA Reconsideration*).

[2] Parties filing comments and replies are listed in Appendix A. We use the abbreviations listed in that appendix throughout this order.

[3] Amendment of Sections 64.702 of the Commission's Rules and Regulations (*Third Computer Inquiry*), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and *sub nom. Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev.filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration*), *further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration*), *appeal pending sub nom. California v. FCC*, No. 88- 7183 (9th Cir.) (pet. for rev. filed May 16, 1988).

[4] As described in the *BOC ONA Order*, the IILC bylaws and procedures reflect a commitment to fair representation of all industry segments. All meetings are open to the public, and decisions are reached through "consensus."

[5] To address issues of joint concern to federal and state regulators, the Commission established a Joint Conference of FCC Commissioners and state Commissioners representing each of the seven BOC regions. *See BOC ONA Reconsideration*, paras. 53-59.

[6] *BOC ONA Order*, 4 FCC rcd at 143, para. 276. We did not require federal tariffing of CNSs. *Id.* at 145-46, para. 280.

[7] The Commission subsequently initiated such a proceeding. Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 4 FCC Rcd 3983 (1989) (*Part 69 Rule Making*).

[8] *BOC ONA Order*, 4 FCC Rcd at 162-171, paras. 309-325. The Commission's actions to ensure that ESPs would be able to continue taking local business lines or other state tariffed access arrangements were designed to preserve the existing ESP exemption from federal access charges.

[9] *Id.* at 188-191, paras. 357-64.

[10] *Id.* at 204, para. 389.

[11] *Id.* at 202-203, paras. 384-88; 207-08, paras. 396-97.

[12] *Id.* at 201-202, paras. 382-83.

[13] *Id.* at 209-254, paras. 398-495.

[14] *See, e.g.*, Telenet Comments at ii; CONAP Comments at 1-2; MCI Comments at 80; ONA Users Group Comments at 6; Dun & Bradstreet Comments at 2, 7-8; ICA Comments at 2, 6; IDCMA Reply at 2; Northern Telecom Comments at 17; and Ameritech States Comments at 5.

[15] AT&T Comments at 3; Tymnet Comments at 35-37.

[16] *See* NTIA Reply at 10.

[17] The requirement that BOCs file CEI plans for permission to offer individual enhanced services will expire at that time.

[18] If the final order in the *Part 69 Rule Making* is not effective at the time the BOCs file federal BSE tariffs, such tariff transmittals should be accompanied by petitions for waiver of relevant Part 69 provisions.

[19] We do not require, however, that such state tariffs be effective for the removal of structural separation.

[20] Among other things, parties suggest that the BOCs report on: (a) responses to requests for new ONA services; (b) progress on implementing IILC consensus recommendations; (c) the use of ONA services by the BOCs' enhanced services operations; and (d) progress on uniformity. *See, e.g.*, CBEMA/ADAPSO Comments at iii; ATSI Reply at 19-20; NTIA Reply at 5-6.

[21] Telenet Comments at 38-39; AT&T Reply 5; EDS Reply at 14. IDCMA also favors ongoing reporting requirements but does not specify the precise format these reports should take. IDCMA Reply at 8-9.

[22] *See, e.g.*, CBEMA/ADAPSO Comments at 15-16; ATSI Reply at 19; EDS Reply at 13-14; IDCMA Reply at 8-9.

[23] Tymnet Comments at 29, 34-35; Telenet Comments at 38-39; AT&T Reply at 6; EDS Reply at 13-14. Telenet and EDS state that this process should be modeled after the one created for equal access conversion complaints. AT&T proposes a three-step complaint process (complaint, answer, and reply) with no discovery and asks that this Commission resolve all such complaints within 120 days.

[24] Ameritech Reply at 13-15; Bell Atlantic Reply, App. A, at 4-6; BellSouth Reply at 55-59; NYNEX Reply at 21; SWBT Reply at 23; US West Reply at 45.

[25] In addition, we direct the BOCs to amend their plans on April 15, 1991 to list all BSEs that each BOC uses for its own enhanced service operations. However, we do not, as some parties request, require the BOCs to file CEI-type plans each time they introduce a new enhanced service. Such a requirement could unduly delay the introduction of new enhanced services by the BOCs, as well as tax the resources of this Commission. Moreover, the information we require on April 15, 1991 could just as effectively ensure that the BOCs do not discriminate in favor of their own enhanced services operations by clarifying which basic ONA services are used by BOC enhanced service operations. Finally, requiring the BOCs to file a CEI-type plan for each new offering would, in effect, require the BOCs to provide advance notice to their competitors of each new BOC enhanced service offering and the configuration of such offering. Permitting the BOCs, instead, to provide an aggregated list of all BSEs that the BOCs provide to their enhanced services operations would prevent the unnecessary disclosure of competitively sensitive information while ensuring that the BOCs took only those BSEs offered in their tariffs.

[26] We already require the BOCs to update their three-year ONA service deployment schedules on an annual basis. Moreover, we clarify, as NTIA requests, that this report must provide updated deployment projections for all ONA services, not just the initial ones. *See* NTIA Reply at 5-6. In addition, we have required: installation reports to ensure the nondiscriminatory

provision of network services; advance disclosure of new network interfaces; advance disclosure of new ONA services; and detailed and timely responses to ONA service requests by ESPs.

[27] Likewise, we decline to mediate IILC disputes. The Commission rejected similar requests in the *BOC ONA Order* and we see no reason to reconsider that decision. *See BOC ONA Order*, 4 FCC Rcd at 34, para. 55. However, Commission staff will continue to attend IILC meetings and monitor IILC progress.

[28] At the present time, the IILC appears to be functioning well. Our staff members have monitored most meetings (in accordance with our statement in the *BOC ONA Order)* and have witnessed useful dialogue and substantial progress. As of Feb. 22, 1990, the ILLC has reached consensus on ten issues, and is currently considering fourteen additional issues. In addition, the IILC bylaws and procedures reflect a commitment to fair representation of all industry segments. We find that the pace of the IILC generally reflects: (a) the technical complexity of many of its issues; (b) the need for the unambiguous specification of functional characteristics for each ONA service under review; (c) variations in the technical characteristics of embedded plant that was not designed with ONA in mind; and (d) the necessity to coordinate IILC efforts with those of standards institutions, such as the T-1 Committee or CCITT, which are not within the ambit of the IILC. The status of the issues that have been addressed as of Feb. 16, 1990 is tabulated in Appendix B.

[29] ESPs offer to order CNSs as a convenience for their customers who may require CNSs in order to benefit fully from certain enhanced services.

[30] *BOC ONA Order*, 4 FCC Rcd at 50-51.

[31] Bell Atlantic Amendments at 1.

[32] Ameritech Amendment at 36-37 & Appendix 12; NYNEX Amendment at Appendix I, at 1 n.4; Pactel Amendment at 12.

[33] BellSouth Amendment at 85-86; SWBT Amendment at 11-13; US West Amendment at 188. US West argues in reply that no legal principle compels or recognizes an indemnification agreement between two divisions of a single corporation. Therefore, US West contends that it makes no sense for US West to require a blanket letter of authorization for its own enhanced services operations. US West Reply at 39-40.

[34] AICC Comments at 38; MCI Comments at 74, 76; and Tyment Comments at 22-24.

[35] The SWBT States recommend that we require all ESPs to obtain a signed authorization letter from each customer prior to ordering CNSs on behalf of the customer. SWBT States Comments at 9, 11-12. However, we do not see sufficient evidence of unauthorized provisioning of CNSs in the enhanced services market at this time to require all ESPs to submit signed authorization letters.

[36] *BOC ONA Order*, 4 FCC Rcd at 58, para. 106.

[37] Bell Atlantic Amendments at 5; US West Amendments at 26.

[38] BellSouth Amendments at 22-23 and Attachment C; NYNEX Amendments at 6-7, n. 8 and Appendix B; and SWBT Amendments at 5.

[39] Ameritech Amendments at 48-49.

[40] Pactel Amendments at 18 and Appendix BB. The two services that were classified as ancillary in Pactel's initial Plan and not reclassified in the amended Plan are Exchange Carrier Billing for ESP and Inhibit Third Number Call Billing to DID Numbers. *See* Pactel ONA Plan, Appendix A at VI, filed Feb. 1, 1988.

[41] Pactel Amendments at Appendix BB. All but one of the six services originally classified as "Other" have been reclassified as BSAs. The sixth service has been reclassified as "Future". *Id.* Pactel states that the 35 items that were not reclassified retain their initial classifications for the reasons specified in Appendix A of the Pactel ONA Plan, filed on February 1, 1988.

[42] For example, it is not clear whether services classified as "P" or "Other" are subject to ONA safeguards, nor is it clear how such offerings would be priced or tariffed.

[43] Pactel employs the classification "Future" for regulated services that might be developed in the future. Although the other BOCs do not include a category for potential future services, we do not find Pactel's use of this classification objectionable for services that are not yet technically feasible. Such services can only be offered, however, after reclassification into one of the approved classifications.

[44] *BOC ONA Order*, 4 FCC Rcd at 59, para. 109. Several parties assert that the Commission must require the BOCs to make billing and collection services available on a nondiscriminatory basis to all ESPs. Telenet Comments at 29; Tymnet Comments at 22; IIA Reply at 5; and ATSI Reply at 11-12. This issue is discussed in the *BOC ONA Reconsideration Order*, paras. 30-34.

[45] *BOC ONA Order*, 4 FCC Rcd at 59, para. 109.

[46] The Message Desk feature provides billing information on incoming calls via a four-wire data link to the ESP's premises. BCLID uses the customized local area signaling services (CLASS) functions of common channel signaling system seven (CCS7) to provide ESPs calling and called directory numbers, or multiline hunt group and terminal number, and the time the call was received. BellSouth Amendments at 8-9.

[47] TWC Task No. 017.

[48] *See e.g.*, Pactel Amendments at 23; US West Amendments at 13-16.

[49] *See* Bell Atlantic Amendments at 2; BellSouth Amendments at 8; NYNEX Amendments at 12, n. 15.

[50] *See* BellSouth Amendments at 8; Pactel Amendments at 22; and SWBT Amendments at 60-61. Pactel notes that ESPs can generally obtain BNA for themselves when a customer orders service, but states that an ESP may not be able to generate this information for "casual users" for whom the ESP does not have prior customer information. *But see* Bell Atlantic Reply at 5-6.

[51] Ameritech Amendments at 67 & App. 4; SWBT Amendments at 60-61. Ameritech also states that it will offer ESPs customers list services for use in marketing or developing end user account databases.

[52] MCI Comments at 39.

[53] ONA Users Group Comments at 29.

[54] Telenet Comments at 25-26. *See also* Tymnet Comments at 20-21; ATSI Reply at 12-13; & IIA Reply at 4-5.

[55] Telenet Comments at 26, 28.

[56] Pactel Reply at 51.

[57] SWBT Reply at 35. SWBT states that Telenet is mistaken in its conclusion that SWBT is proposing to make BNA available only in conjunction with FGD access service, adding that it has recently gained approval of state tariff modifications necessary to offer BNA service in Texas and Missouri. *Id.* at 34-35.

[58] Some ESPs that require their customers to enter a password each time they access a service do not require CNI to identify their customers.

[59] ESPs with an ongoing customer relationship can generally obtain BNA when they initially sign up a customer. However, this may not be possible for "casual users" who access a service (and are billed) on a call-by-call basis.

[60] *BOC ONA Order*, 4 FCC Rcd at 59-60, para. 110. The term "OSS" includes diagnostic, maintenance and network management capabilities that many ESPs claim are needed to control their telecommunications services efficiently. *Id.* at 51 n.167.

[61] *BOC ONA Reconsideration*, App C.

[62] BellSouth Amendments at 14 and Attachment E; SWBT Amendments at 63; and US West Amendments at 19-25.

[63] *See, e.g.*, Bell Atlantic Amendments at 4; NYNEX Amendments at 8, n. 10.

[64] EDS Comments at 24; Telenet Comments at 20. *See also* CBEMA/ADAPSO Comments at 21-22.

[65] NYNEX Reply at 7-8; SWBT Reply at 31-33; and Ameritech Reply at 35.

[66] Bell Atlantic Reply at 3.

[67] *See, e.g.*, US West Amendments at 19-20; Pactel Amendments at 26.

[68] Ameritech Amendments at 70.

[69] NYNEX Amendments at 8 n.10.

[70] BellSouth Amendment at 15-18.

[71] MCI Comments at 33; AICC Comments at 38-40; EDS Comments at 13-14.

[72] IIA Reply at 6. *See also* CBEMA/ADAPSO Comments at 12; Tymnet Comments at 20; MCI Comments at 37; EDS Comments at 3-6; IDCMA Reply at 5-8.

[73] Telenet Comments at 21-22.

[74] BellSouth Reply at 15.

[75] SWBT Reply at 29-30.

[76] *Id.* at 30.

[77] ONA Users Group at 28.

[78] AT&T Reply at 3 n. *.

[79] Bell Atlantic Reply at 3-4.

[80] SWBT Reply at 30; Ameritech Reply at 35-37.

[81] *BOC ONA Order*, 4 FCC Rcd at 45, para. 78.

[82] Ameritech Amendments at 42; Bell Atlantic Amendment at 1; BellSouth Amendments at 7; NYNEX Amendments at 6 n. 6; Pactel Amendments at 11; SWBT Amendments at 4; and US West Amendments at 6-7. Pactel adds that it has filed a Petition for Reconsideration concerning federal tariffing of BSEs and will comply with the ultimate decision on that issue. Pactel Amendments at 11 n. 21. The *BOC ONA Reconsideration* adopted today denies Pactel's petition.

[83] *BOC ONA Order*, 4 FCC Rcd at 71, paras. 135; 255; 496(B)6.

[84] Issue No. 013-NTWC (Proprietary Demand Information).

[85] *See* Ameritech Amendments, App. 13 at 5; Bell Atlantic Amendments at Appendix C; BellSouth Amendments at 34 & App. B; NYNEX Amendments at n.33 & App. K; Pactel Amendments at 33; SWBT Amendments at 50-52; and US West Amendments at 42.

[86] *BOC ONA Order*, 4 FCC Rcd at 70, para. 134.

[87] *Id.* at 255, para. 496, B, (5); *see also id.*, at 67, para. 126.

[88] BellSouth Amendments at 25, 30-31.

[89] NYNEX Amendments at 14.

[90] SWBT Amendments at 7-8.

[91] US West Amendments at 30; Bell Atlantic Amendments at 8; Pactel Amendments at 70.

[92] US West Amendments at 30, 33, & 37-40. US West argues that seven of these 13 requests do not involve network capabilities. US West adds that it chose not to offer the remaining six NCs for the following reasons: (a) lack of specificity in the request; (b) dependence of the network capability on CPE characteristics that are not under the control of the carrier; and (c) the fact that the rejected service is an attribute of another service, which has been rejected for technical reasons.

[93] However, certain parties commented on the omission of specific services (such as network access via Data Over Voice and the ISDN D-Channel) from the initial offerings of particular BOCs. We address these issues, *infra* at para. 98.

[94] *BOC ONA Order*, 4 FCC Rcd at 77, paras. 143, 149.

[95] *See* Bell Atlantic Amendments at 10 & Appendix D; BellSouth Amendments at 38 & Attachment D; NYNEX Amendments at 32 & Appendix G; Pactel Amendments at 63 & Appendices KK, AA; SWBT Amendments at 28 & Appendix 7; and US West Amendments at 44-46 & Appendix A.

[96] Pactel Amendments at 64, *quoting BOC ONA Order* at 4 FCC Rcd 77, para. 149.

[97] AICC Comments at 41-42.

[98] Pactel Reply at 76 & Appendix 2.

[99] SWBT Reply at 45 & Appendix D.

[100] US West Reply at 28 n. 91. US West further states that such assistance is available through its Vendor Service Centers.

[101] *BOC ONA Order*, 4 FCC Rcd at 86-88, paras. 168, 169, & 171.

[102] US West Amendment at 138; Pactel Amendment at 64-65.

[103] BellSouth Amendment at 40-41. BellSouth reserves the right, in the future, to replace price parity with a policy designed to satisfy the minimization of transport cost requirements through technical means, such as multiplexing. *Id.* If BellSouth or any other BOC wishes to replace price parity with another means of satisfying our requirements in this area, it must file a written request with this Commission and obtain approval of the revision before removing price parity.

[104] ONA Users Group Comments at 22.

[105] *Id.* at 23-24, *citing BOC ONA Order*, 4 FCC Rcd at 58, para. 107.

[106] Telenet Comments at 17. *See also* Western Union Comments at 1-3. Telenet agrees, however, that the two-mile rule should not apply if the BOC enhanced service is located in a commercial office building outside the BOC's direct or indirect control if other ESPs are free to locate their operations in the same building.

[107] BellSouth Reply at 50. *See also* Pactel Reply at 78-80; US West Reply at 32-33.

[108] BellSouth Reply at 51.

[109] NYNEX Reply at 27.

[110] Telenet Comments at 18-19.

[111] The two mile rule requires a BOC to charge its collocated enhanced service operations a rate for distance-sensitive transmission equal to a rate for transmission paid by non-collocated operations at a two mile distance from the CO. Practically, this means that ESPs located within two miles from the CO will pay less than the BOC's enhanced service operations, and ESPs located more than two miles from the CO will pay more than the BOC's enhanced service operations.

[112] NYNEX states that only a few central offices in downtown Manhattan have boundaries less than two miles from the CO. NYNEX also adds that the practical difference between the NYNEX and Telenet positions is generally minor, *e.g.*, whether the NYNEX affiliate would be charged at a 1.25-mile band rate

or a 1.5-mile band rate. *See Ex Parte* Letter from Susanne Guyer, NYNEX, Director, Federal Regulatory Matters, to Donna R. Searcy, Secretary, FCC, August 22, 1989.

[113] In developing proposals for the initial set of ONA service offerings, the BOCs used, as a common starting point, a list of 118 NCs, requested by ESPs, which had been compiled by an *ad hoc* BOC task group, and distributed to the IILC membership in *BOC ONA Special Report No. 1, Issue 2, Enhanced Service Provider Request for Network Capabilities* (October 1987). *See BOC ONA Order*, 4 FCC RCd. at 26, para. 34. Staff analysis indicated that only 29 of the 118 NC requests would be available in all seven regions under the originally filed ONA plans. *See BOC ONA Order*, 4 FCC Rcd at 67, para. 125 and Appendix E.

[114] *BOC ONA Order*, 4 FCC Rcd at 256, para. 496.

[115] Ameritech Amendments at 50-51.

[116] BellSouth Amendments at 43, 46, Attachment C, Attachment L. BellSouth adds that it is providing ten additional capabilites that were requested in ESP fora but not included in the list of 118 NCs. *Id.* at 43.

[117] NYNEX Amendments at 6, 8-10, 14, & App. D. Rather than describing its new service development activities in terms of of the list of 118 NCs, NYNEX describes instead the results of its Market Outreach Program, which identified 143 requests for ONA-related telecommunications services. NYNEX states that: (a) 33 ESP requests will be satisfied by 23 new ONA services; (b) 39 ESP requests can be satisfied by 37 existing services; and (c) 71 ESP requests cannot be satisfied for technical or other reasons and will be considered in the future.

[118] Pactel Amendments at 13-14 and App. AA; SWBT Amendments at 15; U S West Amendments at 50-123.

[119] Telenet Commets at 33, n.*.

[120] ONA Users Group Comments at 16, CONAP Reply at 6.

[121] MCI Comments at 18; Tymnet Comments at n. 27.

[122] AT&T Reply at 2.

[123] Ameritech States alleges that Ameritech has not identified the results of its examination of the other BOCs' plans. Ameritech States Comments at 3. However, we find that Ameritech lists 35 new services in its amendments, 21 of which are new services that have been added as a result of analyzing other BOC offerings, and fourteen of which reflect reclassification of existing services.

[124] Appendix C compares the deployments of the BOCs' initial services as depicted in their original ONA plans, with the deployments proposed by the BOCs after having examined each other's plans.

[125] The Commission declined to impose uniform technical specifications for individual NCs, preferring instead that marketplace forces drive the steps toward technical uniformity. The Commission expressed concern that the imposition of technical uniformity by fiat might inhibit innovation and freedom of choice by the EPSs. In addition, the *Order* noted that technical uniformity in the initial offerings would be difficult to achieve because of the differences in embedded technology and uncertainties in market demand. *See BOC ONA Order*, 4 FCC Rcd. at 107; *See also id.* at 66, para. 125).

[126] As described in the *BOC ONA Order*, cross-referencing is a system by which the name, service description, the availability, and the technical method of delivery of each ONA service is catalogued, for each BOC, in an easy-to-use reference document or database. Cross referenceing facilitates efforts by ESPs with national operations to provide enhanced services across BOC boundaries when services are not uniform. *BOC ONA Order*, 4 FCC Rcd at 105, paras. 206-207.

[127] *BOC ONA Order*, 4 FCC Rcd at 256, para. 496(D)11.

[128] As of July 12, 1989, the IILC has agreed to investigate alternatives to a printed *Cross Reference Guide*, such as an on-line data base, or individual "floppy" discs. In addition, on Dec. 29, 1989, the BOC task force released, as a supplement to the *Cross Reference Guide*, a matrix showing the compatibility among specific BSAs and BSEs.

[129] *BOC ONA Order*, 4 FCC Rcd at 256, para. 496(D)12.

[130] *Id.* at 106, para. 207. *See* also *id.* at n. 413.

[131] This project was designated 21-NTWC (Systematic Approach to Uniformity of ONA Services). On April 27, 1989, pursuant to an earlier task, the IILC membership adopted a document entitled, *Principles and Guidelines for Uniformity*, which sets forth the general, philosophical principles that should be applied to discrete areas such as service descriptions, service provision, functionality, tariffs, and support services.

[132] Issue #001-TWC, adopted March 15, 1988. CNI facilitates billing by ESPs and prevents unauthorized use of ESP services.

[133] Issue #003-TWC, adopted March 15, 1988.

[134] Issue #010-TWC, adopted January 25, 1989. Telenet and other ESPs have requested that ISDN users be given the capability of accessing an ESP directly via the D Channel and the LEC end office, rather than via the LEC's packet network.

[135] Issue #011-NTWC adopted February 23, 1989. This capability would allow end users to access an ESP, from anywhere in the nation, with one calling number.

[136] Issue #012-TWC, adopted March 22, 1989. This is an important capability for the alarm industry. The IILC conducted an Alarm Workshop to discuss this issue on May 11, 1989 and a list of 16 desired capabilities was developed.

[137] Telenet Comments at 33, citing *BOC ONA Order*, 4 FCC Rcd at 106, para. 207. *See also* ONA Users Group Comments at 16.

[138] Ameritech Reply at 10-11; Bell Atlantic Reply at 9; Pacific Reply at 39.

[139] The IILC has reached consensus on these ten issues: #001-TWC (Uniform Provision of CNI), #002-TWC (CPNI Availability); #003-TWC (ESP Access to BOC Network Management Systems (OSS)), #004-TWC (InterLATA Transport of ONA Services); #007-NTWC (Guidelines and Principles of Uniformity); #008-TWC (ESP/User Inititated Diagnostics via Symmetric Peer-to-Peer Protocols); #018-TWC (ESP Frame Relaying Access to ISDN Customers); #018-TWC (Ability to Detect Breaks in Telcom Line within 60 Seconds); #018-TWC (Ability to Control CNI Delivery); and #024-NTWC (Calling Party Identification-Anonymity/Privacy).

[140] *BOC ONA Order*, 4 FCC Rcd at 148, para. 284; 166, paras. 316-317; and 173, para. 330.

[141] Ameritech Amendments at 101-106 & Appendix 24.

[142] BellSouth Amendments at 50-57 & Attachment E.

[143] Pactel Amendments at 67-74 & Appendices LL, MM, & NN.

[144] SWBT Amendments at 29-33. SWBT states that it has modified its plans and no longer plans to use a special Enhanced Service Interconnection tariff. SWBT states that four of its five proposed circuit switched BSAs and associated BSEs will be offered via existing feature groups in the state and federal access tariffs. *Id.* at 29-30. It states that a new intrastate and interstate feature group will be established for number delivery access. SWBT states that packet access, identified in its Plan as an existing intrastate tariffed service, will also be offered, prior to final ONA plan approval, in the federal access tariffs, without cross referencing to intrastate tariffs. It originally identified

private line/special access BSAs as currently available in existing intrastate and interstate special access tariffs, and does not modify that aspect of its plan.

[145] NYNEX Amendments at App. H.

[146] US West Amendments at 133 & Appendices E & F. In its initial plan, US West did not strictly utilize the common ONA model. It now clarifies that ESPs must access BSEs through use of an appropriate BSA. However, US West has not created any BSAs which act as the sole vehicle through which a BSE must be accessed. *Id.* at 134.

[147] Bell Atlantic Amendments at 14-15 & Appendix H. Bell Atlantic states that tariff structures for unbundled BSEs will be designed to ensure that BSEs are available with those BSAs with which they are technically and operationally compatible and for which there is market demand.

[148] AICC Comments at 47 (BellSouth's plan), 48 (SWBT's plan), and 46 (Pactel's plan); MCI Comments at 70 (Bell Atlantic's plan), 72-73 (SWBT's plan). *See also* CONAP Reply Comments at 7 (SWBT's plan); Tymnet Comments at 26 (Bell Atlantic's plan).

[149] SWBT States Comments at 3.

[150] MCI Comments at 69-70.

[151] Pactel Reply at 82. AT&T argues that uniform ESP ordering, billing and payment mechanisms should be in place before ONA tariffs are filed. In addition, AT&T states that issues regarding uniform ESP ordering, billing and payment mechanisms should be referred to the Ordering and Billing Forum (OBF) for resolution. AT&T Comments at 17. In response, SWBT argues that the proper forum for these issues is the IILC. SWBT Reply at 43-44. At Commission direction, the OBF has previously served as a forum to resolve ordering and billing problems. *See Memorandum Opinion and Order*, CC Docket No. 86-104 (released July 31, 1987). We agree with AT&T that the OBF is the proper forum for resolution of such issues, because the OBF has years of specific expertise in this complex and technical area. The BOCs should begin discussions of any such potential issues in the OBF.

[152] Several parties argue that federal tariffing rules and jurisdictional issues should be decided before the BOC ONA Plans are approved. Issues cited include: (1) how jurisdictional separations issues will be decided (SWBT States Comments at 5); and 2) whether this Commission should investigate the potential impact on internal administrative systems of IXCs, if Ameritech restructures its access charge structure. MCI Comments at 71. We have concluded that we can and should determine whether these amended plans comply with the requirements in the *BOC ONA Order* before all of the related proceedings are completed. It may, however, be appropriate to revisit the BOCs' state tariffing plans after we have revised federal access rules that affect ONA services. Issues relating to the proper jurisdiction for tariffing ONA services are discussed in the companion *BOC ONA Reconsideration Order* at paras. 35-52.

[153] AICC and Telenet complain about the BOC's proposal to use ICB rates in certain instances. AICC Comments at 15; Telenet Comments at 11. We expect the BOCs to report the use of any ICB rates in intrastate ONA tariffs when they file those tariffs with us on April 15, 1991, and we will generally review those tariffs to determine if they undermine fundamental ONA objectives at that time. The Commission has adopted a general policy that ICB pricing for new interstate basic services can be reasonable as an interim transitional measure, and has required carriers to file averaged rates in specific instances. Local Exchange Carrier Individual Case Basis DS3 Service Offerings, 4 FCC Rcd 8634, 8641-2 at paras. 62-68 (1989).

[154] Certain parties complain that the BOC's illustrative state tariffs are inadequate. *See* Telenet Comments at 19; MCI Comments at 72. We believe that the state tariffs that we require the BOCs to file on July 15, 1991 will be sufficient to facilitate a review at that time. AT&T complains that only Ameritech filed illustrative interstate tariffs. AT&T Comments at 5, n. ***, but the *BOC ONA Order* only required the BOCs to file illustrative state tariffs, as filed by SWBT. *BOC ONA Order*, 4 FCC Rcd 173, para. 330.

[155] *BOC ONA Order*, 4 FCC Rcd at 163-164, para. 312.

[156] BellSouth Amendments at 4, 50.

[157] *BOC ONA Order*, 4 FCC Rcd at 170, para. 324.

[158] BellSouth Amendments at 50.

[159] SWBT Amendments at 35-36.

[160] Pactel Amendments at 74-75 & n. 101.

[161] AT&T also challenges what it terms US West's use of resale restrictions in its illustrative intrastate tariffs. AT&T Comments at 8, n.*. *See also* ONA Users Group Reply at 7-8. The *BOC ONA Order* required BOCs to justify resale restrictions in intrastate tariffs, although we held that pre-existing, generally applicable resale restrictions would be permissible. *See BOC ONA Order*, 4 FCC Rcd at 171, para. 325. We find US West's illustrative intrastate tariff ambiguous regarding whether, and to what extent, it intends to impose restrictions on resale. In the event that US West or any other BOC proposes a resale restriction in a specific state tariff, it will need to justify that restriction.

[162] *BOC ONA Order*, 4 FCC Rcd at 188, para. 357.

[163] The term "system-wide" describes the entire region served by the BOC. "Market areas" are particular submarkets, as defined by each BOC, within its region. The *BOC ONA Order* required each BOC to define the boundaries of the various market areas for which it provides deployment projections. *Id.* at FCC Rcd at 300-301, App. F, paras. 1-7.

[164] A "wire center" is a building in which one or more local switching systems are installed. In the majority of cases, a wire center contains only one switch and is identical to an end office, but in some cases a wire center contains more than one switch, in which case each separate switch represents an end office. *Id.* at 4 FCC Rcd at 179, n.822.

[165] Although the BOCs define their market areas in varying terms, each of them clearly delineates the boundaries of each of its designated market areas. For example, the market areas described by Pactel, NYNEX, and (in part) Bell Atlantic coincide with their LATA boundaries. BellSouth states that its market areas correspond to Metropolitan Statistical Areas, as defined by the Bureau of the Census. The other BOCs delineate the boundaries of their designated market areas through maps and/or wire center listings.

[166] Pactel, however, provides market area deployment projections only for those of its lines that are served by 1AESS, DMS100, or 5ESS switches. *See* Pactel Amendments at App. EE. *See also* Ameritech Amendments at App. 8; Bell Atlantic Amendments at App. I; SWBT Amendments Plan at App. 3; and US West Amendments at App. G. *See also* BellSouth Reply at Att. G (Revised); NYNEX Reply at App. B.

[167] BellSouth also shows deployment on a state-by-state basis, while Bell Atlantic and Pactel show separate deployment projections for each of their operating companies.

[168] *See* Pactel Amendments at App. EE, pp. 15-17; SWBT Amendments at 18-19 & App. 3; BellSouth Amendments at Attachment G; US West Amendments at App. G; and Bell Atlantic Amendments at 17 and App. I.

[169] Under this format, the BOCs would describe the ONA capabilities available at each wire center and the capabilities of specific circuit and packet switches within the wire center, as well as estimated dates of replacement for these switches and the expected replacement technology. *See, e.g.*, Bell Atlantic Amendments at App. K.

[170] *See, e.g.*, Bell Atlantic Amendments at App. K; BellSouth Amendments at Att. H; Pactel Amendments at App. FF; SWBT Amendments at App. 12; and US West Amendments at App. H. Neither NYNEX nor Ameritech mentions the format recommended by the NTWC.

[171] Other BOCs imply that they will adhere to the format without expressly commiting to do so. *See* NYNEX Amendments at 21, note 26 (stating that NYNEX will adhere to its existing format for providing wire center information unless the IILC adopts a different format); and US West Amendments at 147 (stating that US West will "work" to provide wire center data in the format developed at the IILC).

[172] Bell Atlantic Amendments at 18, n.15.

[173] *See* Ameritech Amendments at 174-75; BellSouth Amendments at 62; Pactel Amendments at 40; and SWBT Amendments at 50.

[174] Tymnet Comments at 28-29.

[175] Tymnet Comments at 14, n.26; Telenet Comments at 34.

[176] The *BOC ONA Order* rejected similar claims by AICC and others regarding the availability of specific network services, noting that the services proposed by the BOCs were acceptable given embedded technology, technical limitations in the network and the uncertainty of market demand for additional services.

[177] The criteria are: expected market demand, utility as perceived by ESP competitors, as well as the technical and cost feasibility of unbundling. *See Phase I Order*, 104 FCC 2d at 1065, para. 217.

[178] We strongly encourage members of the industry to raise questions relating to the deployment of particular services with the IILC before bringing them to this Commission. Even if the IILC does not resolve the issue in a manner satisfactory to all parties, at the very least, it should help to establish an informal record that would greatly facilitate our analysis. Moreover, the IILC has recently undertaken consideration of procedures for evaluating specific ESP requests for ONA services.

[179] *BOC ONA Order*, 4 FCC Rcd at 200, para. 378-380.

[180] *Id.* at 201-202, paras. 382-83.

[181] CLASS is an acronym that stands for "Custom Local Area Signaling Service." CLASS services are a group of services, described individually below, that provide subscribers with increased call management capabilities.

[182] *See, e.g.*, Pactel Amendments App. AA at 22, 23, 37, 39, 42, 51-53; US West Amendments at 91-92, 119, 120-122. Further detail on the BOCs' specific deployment plans for CLASS services is included in Appendix E.

[183] Among the benefits identified by the BOCs are internetwork CLASS services; more efficient call set up; more efficient transmission of messages between networks; ISDN user to user information (which allows the transport of call set-up messages between ISDN switches). *See, e.g.*, Ameritech Amendments at 129-30; US West Amendments at 149-50.

[184] ISDN is an all-digital network architecture that will enable customers to obtain voice, data, and video network services over a common local loop interface. Basic ISDN access arrangements will include two "B" channels and a "D" channel, over which out-of band signaling capabilities supporting call control and ISDN supplementary services will be provided.

[185] *See* Ameritech Amendments at 141-42 (Initial ISDN deployment is intended only to demonstrate a commitment to this technology and to provide a base of experience with which to go forward. Extensive deployment prior to the completion of standards would only delay the deployment of standard ISDN equipment when such equipment is made available in the future). *See also* Bell Atlantic Amendments at 21; Pactel Amendments at 46; and NYNEX Amendments at 22.

[186] *See* Ameritech Amendments at 141; US West Amendments at 151; Pactel Amendments at 47-48; BellSouth Amendments at Att. J, pp. 11-12; Bell Atlantic Amendments at 22; and SWBT Amendments at App. 5A.

[187] Ameritech Amendments at 140; Pactel Amendments at 47. *Cf.* US West Amendments at 151 (projecting requirements documents in 1989 and equipment availability in 1993; BellSouth Amendments at Att. J, pp. 11-12 (projecting requirements in 1990 and equipment availability in 1992).

[188] Further detail on Phase 1.1 and 1.2 ISDN services and on the plans of the various BOCs is included in Appendix E.

[189] Frame relay service will enable ESPs to obtain direct access to data on their customers' ISDN D-channels. ESPs currently obtain D-channel data only after the data packets have been routed through the BOCs' packet networks. ESPs object to this arrangement and the resulting charges. Frame relay is a new packet protocol, which would contain address and routing information in a configuration that would permit the routing of D-channel packets to ESPs without traversing the BOC packet networks.

[190] Ameritech Amendments at 144-45.

[191] *See* Ameritech Amendments at 144-45; Bell Atlantic Amendments at 23; BellSouth Amendments at Att. J, pp. 12-13; and NYNEX Amendments at 18, note 21.

[192] The *BOC ONA Order* described the long-term IN architecture as "IN/2." As plans for IN development have changed, so has industry terminology, and the term IN/2 has been supplanted by other terms. To minimize confusion, we reference the Intelligent Network in generic terms only, and without regard to the variety of names and acronyms that various parties use in their pleadings to describe this technology in present or future form.

[193] SWBT Amendments at 24; Pactel Amendments at 53; US West Amendments at 153; and BellSouth Amendments at Att. J, p. 1.

[194] SWBT Amendments at 24; BellSouth Amendments at Att. J, p. 4.

[195] *See* BellSouth Amendments at Att. J, p. 1; Ameritech Amendments at 146, 148.

[196] Appendix E contains further detail on BOC plans for IN-type services.

[197] CBEMA/ADAPSO Comments at 11. CBEMA/ADAPSO does not necessarily fault the BOCs for not providing further information on their deployment plans for future ONA services, but simply notes that the plans are not particularly helpful in mapping the course that future technologies will take. *See also* ICA Reply at 2, 5 (claiming that the BOC plans fit future technologies into the current ONA model rather than changing the model as network capabilities evolve).

[198] Tymnet Comments at 16.

[199] MCI Comments at 40, 49-52.

[200] MCI Comments at 40; Tymnet Comments at 17. Tymnet cites Billing Number Delivery through Q.931 signaling, Uniform 7 Digit Access Number, Preselection for Data Services, and Extended Superframe Conditioning as examples of services for which uniformity is lacking.

[201] AT&T Comments at 18-20; MCI Comments at 41-43.

[202] EDS Comments at 26-28; Telenet Comments at 12-13.

[203] *Id.* at 12-14.

[204] CBEMA/ADAPSO Comments at 8. *See also* CONAP Comments at 10-16; Telenet Comments at App. 1, p.5.

[205] *See, e.g.*, SWBT Reply at 4-5; Bell Atlantic Reply at 11-12, n.45.

[206] As for access to the D channel, we note that this issue is currently being addressed at the IILC, and we believe that the IILC is the proper forum in the first instance to attempt to resolve commentors' concerns. *See e.g.*, Ameritech Reply at 30. Likewise, the IILC is the appropriate forum to consider related concerns about the availability or uniformity of specific services.

[207] *See generally* Represcribing the Authorized Rate of Return for Interstate and Local Exchange Carriers, CC Docket No. 89-624, 5 FCC Rcd 543, 547, Attachment, Table 3 (Common Channel Signaling System 7 by Central Office and Access Lines Served) (1990), and carrier responses thereto.

[208] The fact that planning for future technologies, in particular ISDN and IN, is still at a relatively early stage gives us confidence that the needs of ESPs will be effectively incorporated into this process. Indeed, it is clear from the record in this proceeding that considerable progress has been made in establishing an ongoing industry dialogue with respect to future technologies and services. We are encouraged by this dialogue and expect that it will facilitate implementation of new technologies and services responsive to the needs of ESPs.

[209] *BOC ONA Order*, 4 FCC Rcd at 202-03, paras. 384-88.

[210] These means of providing input into the ONA process are discussed in a BOC Special Report on ESP input that was released by the BOCs in conjunction with an April 5-6, 1989, IILC workshop on future network technologies and ESP input. *See* ESP Input into the Service Development Process, BOC ONA Special Report Number 2, Issue 2, March 1989 (BOC Special Report No. 2).

[211] *See* Ameritech Amendments at 165-67; Bell Atlantic Amendments at 25-26; BellSouth Amendments at 66-67; NYNEX Amendments at 23 and App. K; Pactel Amendments at App. HH; SWBT Amendments at 42; and US West Amendments at 154-55.

[212] *See, e.g.*, Pactel Amendments at 59; SWBT Amendments at 41-42; and US West Amendments at 155 &157. SWBT states that over 100 ESP-requested ONA features have been addressed at this forum. *See* SWBT Amendments at 42; Bell Atlantic Amendments at 29.

[213] *See* Ameritech Amendments at 158-59.

[214] *Id.* at 158.

[215] *See id.* at 159; BellSouth Amendments at 170; and SWBT Amendments at 40. *See also* BOC Special Report No. 2 at 6.

[216] In addition to providing ESPs the opportunity to comment on proposed generic requirements, the BOCs state that they have incorporated ONA principles into the generic developments process through an "ONA Template." The ONA Template is a set of four principles that underlie the ONA concept: (a) capabilities should be unbundled and provided in a modular, flexible manner; (b) ESPs may need "technical linkage" so that they can directly interact with their customers; (c) multiple ESPs should be able to share a single customer and use the same network capability to link with that customer; and (d) all ESPs should receive comparably efficient interconnection with the telephone network. The BOCs state that incorporating these principles into the generic requirements process helps to ensure that future network functionalities will be designed and offered in a manner consistent with ONA policies and the needs of ESPs. *See, e.g.*, Bell Atlantic Amendments at App. O (BOC Special Report No. 2), pp. 7-8.

[217] The T-1 Committee, which is sponsored by the Exchange Carrier Standards Association, provides the mechanism for planning U.S. domestic technical standards for interconnection of the telecommunications facilities of interexchange carriers with those of the LECs. The CCITT performs a similar function in the setting of international telecommunications standards.

[218] Ameritech Amendments at 162; Bell Atlantic Amendments at App. N; and US West Amendments at 152.

[219] MCI Comments at 55-56, 59, & 62.

[220] *BOC ONA Order*, 4 FCC Rcd at 203, note 957. Rather, this requirement was intended to ensure open channels of communication between the BOCs and other industry participants. We expect that with open channels of communication, and regulatory oversight, the BOCs will make good faith efforts to accommodate the needs of ESPs and other network users. If necessary, we will take appropriate steps to ensure that they do.

[221] Of course, the BOCs' discretion with respect to ONA service deployment decisions is constrained by the specific criteria that we have established to govern these decisions. If we find that the BOCs are ignoring these criteria or not applying them correctly, we will take appropriate action.

[222] *BOC ONA Order*, 4 FCC Rcd at 204, para. 389.

[223] Bell Atlantic, however, claims that it is not yet feasible for it to provide deployment information for future ONA services and does not include any such services in its deployment schedule. Bell Atlantic Amended Plan at 33. Likewise, NYNEX shows deployment projections only for initial ONA services. *See* NYNEX Reply at App. B.

[224] BellSouth claims that it was unable to identify any future ONA services, outside those in its deployment schedule already, that it could provide with new switch generics. BellSouth does, however, describe seven non-switch based services that it plans to make available prior to July 1, 1992, but states that it has not yet finalized deployment plans for these services. BellSouth Amended Plan at 71-74. *See also id.* at 74 and Att. C for a description of these services.

[225] Telenet Comments at App. 1, p. 8.

[226] *BOC ONA Order*, 4 FCC Rcd at 207-08, paras. 396-97.

[227] *See, e.g.*, Bell Atlantic Amendments at 34 & App. P; BellSouth Amendments at 75 & Attachment B; NYNEX Amendments at App. K, p. 3 & App. K(2); Pactel Amendments at 34 & App. DD; SWBT Amendments at 43 & App. 9; US West Amendments at 168-170; amd Ameritech Amendments at 168.

[228] MCI, however, claims that, with the possible exception of BellSouth, the BOCs' procedures for processing ESP service requests do not ensure nondiscriminatory treatment of such requests. MCI Comments at 63, 68. *See also* CBEMA/ADAPSO Comments at 13-14 (claiming that the *BOC ONA Order* contains no mechanism to protect against discrimination by the BOCs in processing of service requests). The Commission addressed these concerns in the *BOC ONA Order* and we will not revisit them here. *See BOC ONA Order*, 4 FCC Rcd at 205, paras. 390-397.

[229] *BOC ONA Order*, 4 FCC Rcd at 211, para. 402. *See also Phase II Reconsideration*, 3 FCC Rcd at 1162-1163, para. 27. Dun & Bradstreet challenges the adequacy of this definition of CPNI both in a petition for reconsideration and in this proceeding. Dun & Bradstreet Comments at 7. Since the Commission addressed this issue in the *BOC ONA Order*, we will not revisit it here. Dun & Bradstreet's petition for reconsideration is considered in the *BOC ONA Reconsideration*, at para. 85.

[230] The Commission also clarified that traffic studies and forwarded-to numbers are CPNI, *BOC ONA Order*, 4 FCC Rcd at 215, para. 411, n. 1013, and that credit information is not. *Id.* at 216, para. 412. Moreover, the Order prohibited the BOCs from making unpublished and unlisted telephone numbers available to their enhanced services personnel. *Id.* at 217, para. 415.

[231] Pactel Amendments at 76; Bell Atlantic Amendments at 36; BellSouth Amendments at 78; NYNEX Amendments at 35; SWBT Amendments at 56-57; and US West Amendments at 173.

[232] ONA Users Group Comments at 31-32.

[233] *BOC ONA Order*, 4 FCC Rcd at 218, para. 418.

[234] Ameritech Amendments at 113; BellSouth Amendments at 82; NYNEX Appendix J at 1; Pactel Amendments at 77. Although BellSouth does not currently intend to charge for providing this information, if it does impose a charge to cover administrative costs, it states that it will apply the charge equally to affiliated and non-affiliated ESPs. BellSouth Amendments at 82.

[235] The order requested proposals by other BOCs to implement administrative protections, such as "flagging" documents with restricted CPNI, to restrict access. *BOC ONA Order*, 4 FCC Rcd at 223, para. 430.

[236] A BOC must also demonstrate that its plan is the most effective alternative under the circumstances. The Order stated that generalized assertions, such as "economic infeasibility," will not suffice, and that BOCs that wish to implement an alternative system, in whole or in part, must provide evidence that a password/ID system and/or network services-only personnel are infeasible in the particular circumstances. *Id.* 4 FCC Rcd at 223-224, para. 430.

[237] Bell Atlantic Amendments at 36-37. Enhanced service marketing personnel will be automatically denied access to restricted CPNI.

[238] Bell Atlantic says it will require those personnel to check customers' telephone records to determine whether their CPNI is restricted before attempting to sell them any enhanced services. Bell Atlantic also states that these personnel will accept marketing requests initiated by a customer. *Id.* at 39.

[239] Bell Atlantic states that customer information exists in over 100 databases, but that most of these data bases are not used by enhanced services personnel. *Id.* at 36, n. 31.

[240] BellSouth Amendments at 79. BellSouth states that its password/ID system is also comparable to BellSouth's CPE CPNI plan filed previously in CC Docket 86-79.

[241] Likewise, BellSouth indicates that although its marketing staff have access to CPNI in the order processing system, such CPNI is specific to an order and not used for marketing. Moreover, it states that it has instructed its marketing personnel not to access restricted CPNI and warned them that they will be subject to disciplinary action if they violate that rule. BellSouth Reply at 52-54.

[242] BellSouth Amendments at 81.

[243] Pactel maintains that its enhanced services personnel will not have access to the maintenance operations, and facilities access and control databases. However, enhanced services personnel will have access to other databases that have fragmented CPNI for provisioning, servicing, maintenance and billing operations. Pactel Reply at 85. *See also id.* at Appendix 3 for a more detailed list of Pactel's databases.

[244] SWBT Amendments at 57.

[245] NYNEX Reply at 30; US West Amendments at 175-176.

[246] Ameritech States Comments at 4.

[247] MCI Comments at 79; ONA Users Group Comments at 30.

[248] ATSI Reply at 9-10. ATSI also argues that the BOCs reduce the quality of service that they provide to those customers that restrict their CPNI. *Id.* at 6, n.10.

[249] We recognize that the BOCs may be technically unable to implement such systems immediately and find it reasonable for BOCs to continue use of the interim methods included in their approved CEI plans for one year from the release of this Order. *See* Pactel Amendments at 79.

[250] On a related issue, parties criticize specific proposals by SWBT, Bell Atlantic, and Pactel to allow their enhanced services marketing personnel to access restricted CPNI in specific situations. At issue are alleged proposals by BOCs to allow enhanced services marketing personnel to access restricted CPNI when workload is heavy (SWBT), for purposes other than marketing (Pactel), and for customer service activities (Bell Atlantic). *See* SWBT States Comments at 12-13; Dun & Bradstreet Comments at 5-6; ATSI Reply at 9-10. We believe that the Bell Atlantic proposal has been mischaracterized, because Bell Atlantic Customer Service representatives do not appear to market enhanced services. However, we believe that Pactel should explain in more detail when it files its amendments on April 15, 1991 what databases it proposes to let enhanced service marketers access "for purposes other than marketing". Regarding SWBT, we are not convinced that allowing enhanced services personnel to routinely access restricted CPNI "when workload is heavy" provides the level of security we require for restricted CPNI. We would consider a request for a waiver to permit such access if, for example, for a small office with limited staff and little restricted CPNI it could be demonstrated that the public benefit would outweigh the failure to comply with the structure we have established. Accordingly, we require SWBT to revise its operations to comply with our requirements and to amend its plans by April 15, 1991 to reflect those changes.

[251] Ameritech Amendments at 115; BellSouth Amendments at 81; NYNEX Amendments at 36; SWBT Amendments at 58; and US West Amendments at 177.

[252] *BOC ONA Order*, 4 FCC Rcd at 232-233, para. 447.

[253] SWBT Amendments at 59.

[254] The *BOC ONA Order* clarified that such notices should briefly describe available CPNI information, the terms and dates on which it will be made available, and how the parties may obtain it. Ameritech's ONA plan did not discuss aggregate CPNI, while Pactel did not describe how it will notify ESPs of the availability of this information. *BOC ONA Order*, 4 FCC Rcd at 234, para. 450, n. 1098.

[255] Although Telenet contended that Pactel proposed to make aggregate CPNI available only to ESPs in California and Nevada, Pactel offered, in reply comments, to make aggregate CPNI available nationwide. *See* Telenet Comments at Appendix 1, p. 17; Pactel Reply at 94.

[256] *BOC ONA Order*, 4 FCC Rcd at 232, para. 444.

[257] NYNEX Amendments at 36; SWBT Amendments at 58.

[258] We also clarify that the BOCs must inform customers that they may temporarily restrict CPNI available to BOC enhanced service operations and that they may also temporarily release CPNI to unaffiliated ESPs.

[259] Some BOCs appear to have differing interpretations of this partial restriction rule. We also clarify that partial restriction applies to both release of CPNI to ESPs and restriction of CPNI from BOC enhanced services operations.

[260] In adapting these notices for enhanced services purposes, the *BOC ONA Order* stated that the BOCs should include illustrative examples of enhanced services. *BOC ONA Order*, 4 FCC Rcd at 230, para. 440, n. 1076.

[261] MCI Comments at 78.

[262] Telenet Comments at 30-31.

[263] *BOC ONA Order*, 4 FCC Rcd at 229, para. 440.

[264] In the previous section, we required BOCs to inform customers of their right to temporarily or partially restrict their CPNI in their annual notification. We require the BOCs to submit amended notification letters reflecting these changes for our review and approval 90 days before they intend to send the forms to customers. *See* ONA Users Group Comments at 30-31. We also require more generally that the BOCs file notification letters with the Bureau 90 days before they intend to propose changes to the letters.

[265] Bell Atlantic Amendments at 42-44.

[266] *BOC ONA Order*, 4 FCC Rcd at 243, para. 468.

[267] US West Amendments at 182-183.

[268] Bell Atlantic Amendments at 41.

[269] We note that in the *BOC ONA Reconsideration*, the installation and maintenance reporting requirement was changed for all BOCs. *BOC ONA Reconsideration*, at paras. 73-80.

[270] *See BOC ONA Reconsideration Order* at para. 83.